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NATIONALITY

INCLUDING

NATURALIZATION

AND

ENGLISH LAW ON THE HIGH SEAS AND BEYOND THE REALM

PART II.

ENGLISH LAW ON THE HIGH SEAS AND BEYOND THE REALM.

F. T. PIGGOTT.

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INCLUDING

NATURALIZATION AND ENGLISH LAW ON THE HIGH SEAS AND BEYOND THE REALM.

IN TWO PARTS.

PART II.

English Law on the High Seas and Beyond the Realm.

Taylor BY

SIR FRANCIS PIGGOTT, KT., M.A., LL.M.,

CHIEF JUSTICE OF HONG KONG.

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Additional Notes to Part II.

Page 3, line 23.

The sentence "a foreigner's right to copyright" should be—

a foreigner's right under the former law to copyright.

Page 6, 1st footnote.

The reference in the margin should be "L. R. 2 Ex. D. at p. 236."

Page 33, line 25.

In lieu of the sentence beginning "There does not seem" to the end of the paragraph, the following should be substituted:—

It is in fact expressly provided in s. 569 of the Merchant Shipping Act, 1894, that "all wreck, being foreign goods brought or coming into the United Kingdom or Isle of Man, shall be subject to the same duties as if the same was imported into the United Kingdom or Isle of Man respectively." Colonial legislation is, I believe, usually conceived in the same sense.

Page 118, line 23.

The reference in the margin should be "*cf.* p. 137, *note*."

Page 120, line 25.

It is clear, as stated on p. 121, that Lord Stowell laid down an entirely different principle to Lord Justice Turner. The doctrine of construction by "religious adherence" to the principle of international law the existence of which is assumed, is the negative of the rule which admits a construction affecting foreigners abroad if the context is very clear.

This explains the reference on p. 122 (9th line from the bottom) to the somewhat indiscriminate use of the authorities by the Judges. The distinction between the two cases referred to by Cockburn, C.J., is further dealt with on p. 207.

Page 132, line 9.

The words "in such a case" are not intended, as they would appear, to refer to such a case as that of Lord Coleridge's Dutchman, but to such a case as came for decision in *R.* v. *Anderson*: that is to say, the case of an offence committed by a foreign seaman committed on board a British ship to which he belongs in a foreign port, which is dealt with by s. 687 of the Merchant Shipping Act, 1894.

The case of the Dutchman going on board the ship and committing an offence would not fall within the provisions of this section; but if he

committed one of the offences "specially extended," he would fall within the Admiralty jurisdiction. [As to this see the analysis on pp. 143, 144.]

Lord Coleridge, however, presumed that he would be entitled to the protection of the British flag. How far this protection exists on British ships in foreign waters in the case of British subjects on board, or of persons belonging to the ship, has been considered in the first chapter. It is altogether a debateable question: much more so is the case put by Lord Coleridge.

Page 135, 14th line from the bottom.

The sentence beginning "If it did," should read—

"If it did, it was assumed that the Central Criminal Court would have jurisdiction in the present day."

Page 142, line 23.

The reference to the jurisdiction of the Central Criminal Court must be taken subject to the conclusions arrived at on p. 153, where the jurisdiction of this Court is discussed.

Page 153, 3rd paragraph.

The sentence "The Admiralty is here used for the first time," should read—

The "Admiralty" jurisdiction is here used for the first time in the operative as distinguished from the descriptive part of the statute.

Page 172, last line.

Extradition of foreigners who have committed an offence may also be requested. I have, however, limited the statement to subjects, as the extradition of a foreigner for a slave-trade offence committed within the area of jurisdiction embraced by the Act of 1824 (*see* p. 167) might give rise to complicated questions.

Page 184, 3rd paragraph.

The discussion (on p. 66) as to the relation of the doctrine of "continued intention" to the question of jurisdiction over persons out of the realm, is obviously closely connected in principle with the subject discussed on this page. The conclusions arrived at in the two cases are different, but neither is put forward positively. The fact that one depends on the construction of a statute, whereas the other does not, may be sufficient to account for this difference.

Pages 193, 196.

The importance of the question whether the territorial waters are high seas, or, as some contend, part of the territory, may be practically illustrated by considering the curious rule which governs the liability to income tax.

As a general rule, persons who are not resident within the United Kingdom are not liable to the tax, and this exemption continues during six months' temporary residence in the kingdom. But if the residence exceeds six months, even by one day, then the liability accrues in respect

of the whole period of residence. The calculation must often be a question of some nicety, and it is evident that if the territorial waters are part of the dominion, the time spent by a traveller on board ship in these waters, coming and going, must be taken into account. I think it may be safely assumed that the Inland Revenue Commissioners have never thought of acting on such a rule.

The Income Tax Acts furnish a practical illustration of another rule advanced in an earlier chapter—that statutes do not apply of their own strength on board ships on the high sea. If they did apply, liability to the tax would arise in respect of money paid on board ship. But again, I think it may be assumed that the Commissioners have never enforced such a rule.

Page 208, lines 17, 18.

Some words have inadvertently dropped out here: the sentence should read—

"in sanctioning the performance of an act which is in violation of the local law."

Page 256, 9th line from the bottom.

As to copyright being granted to good and bad books alike, this must of course be understood subject to the exception as to seditious, libellous, and immoral books. The question of "literary value" as a necessary condition to copyright is discussed by Mr. Scrutton in his work on the Law of Copyright; but the cases cited show clearly, I think, that copyright would not be denied merely because a book contained no literary merit.

Page 220, line 24.

After the words "would arise" there should be inserted—

"so far as naturalized persons are concerned."

Page 228, note.

I have not thought it necessary to include "Service of procedure out of the jurisdiction" in this chapter, for several reasons; the principal being that the subject has already been dealt with by me in a separate work. For the purposes of this work I have thought it better to leave the rule of "service of notice of writ in lieu of writ" without comment. Yet one supplementary remark may not be out of place.

On p. 208 I have pointed out that the English Courts have not gone to the length, in the case of oaths administered abroad in defiance, so to speak, of the local law, of holding that the local law must prevail to the setting aside of the evidence. This question gives rise to many reflexions: and there is one point in connexion with the practice of serving "notice of writ" which has some affinity with it. Under the French law no process is validly served unless it be by an usher attached to the Court. It may, I think, be taken for granted that the service of a writ on a British subject in France (or in Mauritius) could not be served otherwise than by an usher. But would the service (or "giving," as it is sometimes called) of a notice be an infringement of the French law? If so, would the service be good; further, would the usher whose privileges had been infringed be entitled to claim his fee?

Page 230, last paragraph.

This paragraph should commence as follows—

Quite apart from the merits of the Act itself, it is submitted that these provisions of it may be justified . . .

Page 256, 4th line from the bottom.

The sentence beginning "The actual point" should read—

The point in issue is now of consequence only in the case of such foreign authors as do not fall within the benefits of subsequent legislation and conventions.

Page 266.

The following should be added at the end of the 2nd paragraph :—

"Although, as will hereafter appear (*see* p. 276), there is one condition in the Act which seems specially to affect persons who carry on business in this country."

Page 292, 2nd paragraph.

After the words "Hague Convention" the remainder of the paragraph should be deleted, and the following substituted :—

the terms "territorial waters" of the agreement, and "exclusive fishery limits" of the statute, must be interpreted in the same way as in that convention, and be subject to the remarks already made as to their meaning.

Page 298, 2nd paragraph.

Apart from the questions raised in this paragraph relative to the Herring Fishery (Scotland) Act, 1889, there is another point, as to which I find considerable difficulty in making any suggestion. It arises from the apparent conflict between this Act and the North Sea Convention.

By Art. 4 of the Convention, "the limits of the North Sea are fixed on the north by the parallel of the 61st degree of latitude, and on the west, *inter alia*, by the eastern coasts of England and Scotland, and by a straight line joining Duncansby Head and the southern point of South Ronaldsha (Orkney Islands);" and the exclusive fishery rights are limited to 3 miles from the coast, or in the case of bays, to 3 miles "from a straight line drawn across the bay, in the part nearest the entrance, at the first point where the width does not exceed 10 miles."

Neither of the bays referred to in the paragraph come within this definition; and the proviso which is to be found in s. 10 of the Sea Fisheries Regulation (Scotland) Act, 1895, as to the acceptance of the 13-mile limit by the signatory Powers to the Hague Convention, is not inserted. It is difficult to see how the provisions of the Act of 1889 could be enforced against subjects of these signatory Powers. [As to the intention that the Act should operate against foreigners, *cf.* pp. 298, *et seq.*]

Page 302.

The two sections of the chapter headed "*NEWFOUNDLAND*" and "*CANADA*" respectively should be one section, headed "*CANADA AND NEWFOUNDLAND.*"

Corrigenda to Part II.

Page xii., *Table of Contents*, line 24, *for* 'Bankruptcy Act, 1889,' *read* 'Bankruptcy Act, 1869.'
„ 2, line 19, *for* 'Crosswell' *read* 'Cresswell.'
„ 4, line 8, *after* 'book' *insert* 'is.'
„ 10, line 27, *for* 'rule' *read* 'rules.'
„ 11, the last marginal note *should be deleted.*
„ 20, first marginal note, *after* 'punishment for' *insert* 'breach.'
„ 26, first marginal note, *for* 'loc' *read* 'local.'
„ 27, line 8, *delete* '[s. 686]' *before the word* 'case'; line 10 from bottom, *for* 'with deals' *read* 'deals with.'
„ 31, line 4, *for* 's. 687' *read* 's. 686'; line 14, *for* 'for' *read* 'in.'
„ 36, line 24, *for* 'Mariana' *read* 'Marianna.'
„ 51, line 10, the colon *should be replaced by* a comma.
„ 56, line 11, *for* 'mabe' *read* 'made.'
„ 64, line 4, *delete* the comma.
„ 65, line 23, *for* 'vencing' *read* 'vincing.'
„ 67, line 13, *delete* the second 'that.'
„ 89, line 6 from the bottom, *for* 'enactment' *read* 'enactments.'
„ 91, line 13, *for* 'person' *read* 'persons.'
„ 93, line 4 from the bottom, *for* 'c. 29' *read* 'c. 27.'
„ 98, line 13, *for* 'c. 93' *read* 'c. 98.'
„ 100, line 20, the year number of the statute *should be* '7 & 8 Geo. IV. c. 28.'
„ 101, the headline should be 'The Extra-territorial Criminal Law of England.'
„ 103, line 2, *after* 'Treason Act' *insert* '1543.'
„ 109, line 4 from the bottom, *for* 'he' *read* 'be.'
„ 110, line 24, *for* 'Akabia' *read* 'Arabia'; lines 20 and 21, the return bracket *should come after* 'c. 38,' and the 'and' between '42' and '43' *replaced by* '&.'
„ 112, line 2, *for* 'Explosives' *read* 'Explosive.'
„ 119, line 8 from the bottom, *for* 'constructed' *read* 'construed.'
„ 124, line 18, *for* 'applications' *read* 'application.'
„ 129, line 2 from the bottom of the text, *for* 'claims' *read* 'claim'; line 3 of footnote, *for* 'maritimes' *read* 'maritime.'
„ 130, line 11, *for* 'much' *read* 'more.'
„ 131, line 8, *delete* 'of.'
„ 132, line 9, *for* 's. 686' *read* 's. 687.'
„ 134, line 2 from the bottom, *delete* the inverted comma *before* 'to the.'
„ 137, line 21, *for* 'the application' *read* 'their application.'
„ 138, line 27, *for* 'or' *read* 'of.'
„ 144, first marginal note, *for* 'c. c. R.' *read* 'C. C. R.'

Page 146, last marginal note, *for* '34 & 34' *read* '33 & 34.'
„ 158, line 18, *for* 'He' *read* 'The Lord Chief Justice.'
„ 162, line 5, *for* 'Will. II' *read* 'Will. III'; line 5 from the bottom, *for* '3 Geo. I' *read* '8 Geo. I.'
„ 163, line 1, *after* 'Will. III' *read* 'c. 7.'
„ 165, line 7, *for* 'refere' *read* 'refers.'
„ 168, line 1, *for* 'brougth' *read* 'brought'; line 7 from the bottom, *for* 'recite' *read* 'recites.'
„ 175, line 7 from the bottom, *for* '1870' *read* '1890.'
„ 176, line 1 of Note, *for* '1881' *read* '1861'; and *for* 'c. 35' *read* 'c. 31'; line 13 from the bottom, *for* 'c. 68' *read* 'c. 69.'
„ 179, line 3 from the bottom, *for* '1886' *read* '1883.'
„ 188, line 7 from the bottom, *for* 'Offences' *read* 'Protection.'
„ 191, line 13, *delete* 'sufficiently.'
„ 192, line 10 from the bottom, *for* 'his' *read* 'the.'
„ 193, line 1, *for* 'not' *read* 'nor.'
„ 196, line 27, *for* 'rosecution' *read* 'prosecution.'
„ 201, line 13, 'limitoffences' *should be two words*, the comma *following* 'limit.'
„ 219, last line of the text, *for* 'Fabre' *read* 'Favre.'
„ 220, line 7 from the bottom, *delete* the comma *after* 's. 2.'
„ 221, line 7 from the bottom, *for* 'sions' *read* 'sion."
„ 222, line 11 from the bottom, *for* 'construced' *read* 'construed.'
„ 223, line 12 from the bottom, *delete* the comma *before* 'which we,' and *insert* a comma *after* 'and which.'
„ 227, line 25, *delete* the comma *after* 'It is true.'
„ 231, line 20, *for* '177' *read* '1877.'
„ 248, line 10, *for* 'Jeffrys' *read* 'Jefferys.'
„ 252, line 5 from the bottom, *for* '1845' *read* '1842;' line 14, *for* 'unmistaken' *read* 'unmistakable.'
„ 260, line 7, *for* 'as' *read* 'we'; line 23, *for* 'Lands' *read* 'Land.'
„ 270, line 6 from the bottom, *after* '2 Q. B.' *insert* 'p.'
„ 272, line 24, *after* 'usual' *insert* 'residence.'
„ 273, line 3, *after* 'but' *insert* 'one.'
„ 274, line 6, *delete the second* 'is.'
„ 280, line 18 from the bottom, *delete* the comma *after* 'kingdom.'
„ 294, last line, *for* '53' *read* '52.'
„ 298, line 10 from the bottom, *for* 'puting' *read* 'putting.'

Of the Extra-Territorial Consequences of British Nationality.

The subject of Nationality, and consequently of Naturalization, would be incompletely treated unless special consideration were given to the consequences attaching thereto according to English law.

So long as we have only to deal with the territorial limits of the realm, the consequences may be stated in one short sentence—obedience to the law. But legislation does not, nor could it, end with the territorial limits of the realm. It becomes necessary, therefore, in order completely to understand the consequences of British nationality, to study the laws which affect British subjects when they are "beyond the sea"—that is to say, beyond the area of the normal application of Acts of Parliament, and of the jurisdiction of the Courts.

The subject of the special application of laws beyond the realm divides itself into two broad heads: legislation for the high seas, and legislation professing to operate on land beyond the seas.

A comparative study of different systems of extra-territorial legislation reveals no general principles of common acceptance. There is agreement on one point only: that all persons within any country owe obedience to its laws, irrespective of their own nationality: and from this agreement there results as a corollary, that a nation surrenders its subjects to the laws and jurisdiction of the State in which they are, during the continuance of their presence therein. Diplomatic intervention could not take place in consequence of the condemnation to death of an Englishman for a crime punishable by death in another country: though diplomacy might watch the manner of the trial, and perhaps, should occasion arise, criticise the partiality of the finding. This might conceivably be extended to the method of carrying out the death sentence: but the intervention would inevitably be limited to "good offices": it could not be based on any ground approaching a right.

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But even this corollary has limitations of its own. It does not follow, because a foreigner in England is admittedly subject to the laws of England, and an Englishman in a foreign country to the laws of that country, that therefore the country of origin in either case abandons its own authority over its subject. If any act be an offence by the extra-territorial laws of that country, as well as by the laws of the country in which the act has been committed, it does not follow that the offender may not be put upon his trial when he comes within reach of the laws of his own country. If he has been tried in the foreign country, the effect of the foreign verdict may be the subject of special legislation, or of judicial ruling. In England the Courts have worked out a principle for themselves : and acting on the fundamental rule that a man may not be twice in jeopardy for the same offence, have extended the scope of the defences *autrefois acquit* and *autrefois convict*, to acquittals and convictions by foreign Courts administering foreign laws (*per* Lord Chancellor King in *Burrows* v. *Jemino*) ; limiting (as it would appear from the reasoning of Crosswell J. in *R.* v. *Azzopardi*), their own enquiry to the question, whether the offence with which the accused is charged is of the same gravity as that for which he has already stood his trial abroad.

[3 Strange, 733.]

[6 St. Tr. : N. S. 21.]

Beyond this point, with the exception of national ships on the high seas, agreement as to the proper scope of extra-territorial legislation ceases. Some countries require obedience to all laws from subjects wherever they may be. The English principle has been to limit this extra-territorial obedience to laws dealing with the gravest offences—high treason and murder ; and to certain others which the occurrences of the moment have shown to be expedient, such as, in old days sedition, and incitement to mutiny : in modern times, those dealing with explosive substances, and with the protection of women and girls from kidnapping for purposes of prostitution ? It cannot even be said that there is any agreement that extra-territorial laws should be limited to the subjects of the nation which enacts them. This question is a thorny one, and much argument must be devoted to unravelling it. In the opinion of the author, the law of England has not hesitated, in the case of high treason, to extend its operation to foreigners abroad ; and this, as will be seen in the course of the enquiry, is not the only example.

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The examination of such a question as the one I have just propounded—What is the legitimate scope of extra-territorial legislation ?—takes us into the region of first principles, and there we find little unanimity of opinion. The question has been approached often : suggestions have been thrown out as to what the principles are, or at least ought to be : but there is no definite decision covering the whole ground. As a rule the question has been avoided, wherever it has been found unnecessary to apply any principle to its full extent. The inevitable consequence of this is, that so far as the ultimate principle itself is concerned, the *dicta* may always be treated as *obiter*. Another difficulty, not uncommon in English law, stands in the way of a clear statement of the law. Such a question can only be solved by a process of evolution in which the Judges of many periods must take their share. It is inevitable that the older opinions must be abandoned in favour of those which have resulted from a longer study of the subject by the Judges ; but there is a reluctance to admit the necessity. In no branch of law, I think, is this more noticable than in the present case : the most striking example occurring in connection with the question of a foreigner's right to copyright in this country.

Much of the discussion turns on questions which were dealt with in the Lord Chief Justice's judgment in *the "Franconia" case*. The main thread of argument was elaborated with infinite learning and care : but many questions which lay on the outer edge of the subject were referred to, which could not be treated with the same elaboration.

The main question with which Sir Alexander Cockburn dealt was the existence or non-existence of the 3-mile limit. Of the subordinate questions, one was of the greatest importance — Was there any jurisdiction inherent in the Admiral to deal with foreigners on board foreign ships on the high sea ? The importance of the first question has passed away, as it is now governed by statute. Whether the second question has not also passed into the region of statutory law is a point which the Court might have decided in *Anderson's case* : but it was avoided.

Perhaps the most curious point in connection with the Chief Justice's judgment is, that the concentration which he brought to bear on the question of high sea jurisdiction over foreigners, thrust out of sight the more important question of high sea juris-

Introduction. diction over British subjects. One of the principal points to which the present enquiry will be directed is to ascertain what the law is with regard to British subjects on board foreign ships. Putting this question into practical shape, it may be stated thus—Does a British subject, by going on board a foreign vessel, escape from that important consequence of his nationality, obedience to the English law of the high sea ?

The scope of this part of the book as follows :—

In the first chapter I have taken a broad survey of the principles of extra-territorial law, more especially in connection with the high sea. It is not very systematic ; but is rather a collection of detached principles, more or less inchoate, which are independent of express enactment, or of which certain special legislation is the embodiment. It might fittingly be called an enquiry into the Common Law of the sea. In the second chapter I have given so much of the substance of the extra-territorial laws of England as is required to understand each branch of the question, and as it is necessary to refer to in the succeeding chapters. Taking these texts, the third Chapter is devoted to an analysis of the legislation, in order to determine the persons to whom, and the area over which, this legislation applies : and also the jurisdiction of the Courts as to the trial of offences. This analysis is tested in the fourth chapter by the application of the principles to the several details of the statutes.

The fifth chapter is devoted to the legislation affecting the territorial waters.

The extra-territorial extensions of the criminal law being exhausted, I have taken, in the sixth chapter, a survey of extra-territorial legislation as a whole, and have specially examined the questions of extra-territorial marriages, wills, oaths and the taking of evidence. In the seventh chapter, the enjoyment by persons abroad of territorial rights in the United Kingdom is considered, mainly by the light of the two leading cases on the law of copyright. The extra-territorial effect of the law of bankruptcy forms the subject of a special chapter : and finally, in the ninth chapter I have examined the interesting question of the extension of jurisdiction seaward for the purposes of creating and protecting the home sea-fisheries.

Chapter I.

The Principles of Extra-territorial Law.

A fallacy in Broom's "Legal Maxims" considered.

It is important at the outset to dissipate a fallacy which was stated as law by Broom in his "Legal Maxims", and which has been allowed to remain in later editions. "Although a British subject may", says the learned author, "in certain cases, forfeit his rights as such by adhering to a foreign Power, he yet remains at common law always liable to his duties : and if, in the course of such employment, he violates the laws of his native country, he will be exposed to punishment when he comes within reach of her tribunals".

It will be observed that the statement deals with British subjects who are naturalized in foreign countries. If it were true of them, it would, *a fortiori*, be true of non-naturalized British subjects abroad. Since 1870, it is certainly untrue as to British subjects naturalized in a foreign State. But at no time was it true even of British subjects abroad ; and the only way of giving it an accurate meaning is to omit all reference to naturalization, and to limit it to those laws which profess to have an extra-territorial application. The fallacy is of course based on a misconception of the meaning which the maxim *nemo potest exuere patriam* formerly had, and also of the true consequences of nationality and meaning of allegiance.*

The fundamental principle of territoriality of legislation has existed quite as long as the maxim, and was in force concurrently with it. Adherence to a foreign Power prior to 1870 did not involve loss of British nationality ; but if the adherence were abroad, and it could not well be otherwise, the fact that the person remained a British subject in spite of naturalization, did not make him owe obedience generally to the laws of his own country : but only in so far as they professed to bind him being abroad.

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*Lord Halsbury C., seems to have adopted this statement of Broom's in his judgment in *Cooke* v. *Charles A. Vogeler Co.*, where he says "an Englishman by reason of his nationality is subject to the laws of his Sovereign wherever he may be" : the dictum must however probably be read subject to the modification suggested in the text. [L. R. 1901, A. C. at p. 108.]

The earlier expositions of the law of exterritoriality were based on a kindred fallacy, which has been considered at length in my book on "Exterritoriality".

General principles governing extra-territorial legislation.

This leads us naturally to the statement of the first principle which governs extra-territorial law, which is, that it depends now entirely on statute. That obedience to the statute has taken the place of allegiance to the King, is the maxim with which we started;‡ and it does not affect the truth of that maxim if we add to it this: that in the case of extra-territorial legislation, obedience to the statute is based on allegiance to the King. The omnipotence of Parliament is from its nature territorial, whilst allegiance to the King can have no limitation as to territory, but only of fact—whether a person is a subject or not.

The second fundamental principle is that the duties imposed by extra-territorial laws applicable to subjects in foreign countries are of imperfect sanction, and breaches of them cannot be made a ground for extradition; for the treaties only apply to offences committed within the State applying for extradition of an offender, or on the high seas. And unless it be by means of the procedure for outlawry, which has been allowed to slumber since 1859*, and the consequent forfeiture of property, they must remain a dead letter until the offender choose to return to this country. Neither the laws of England nor of other States allow him to be arrested by British police officers in a foreign country: and it seems fairly certain that the English Courts look with no favourable eye upon his being decoyed to a place where the British police might lawfully arrest him.

Extra-territorial application of the common law.

So far I have referred only to legislation which applies to persons beyond the realm: but there is another point of equal importance, the application of the common law to such persons. As has already been stated the common law does not apply to subjects in foreign countries, nor, with the solitary exception of the prerogative writ of return, can it be said that it ever professed to. The extent of its application to persons on the high sea is however by no means free from difficulty, and the enquiry leads to the ultimate question whether the law of the sea is lawlessness. The centre of interest is of course the law maritime in its application to ships: but this does not exhaust the subject, for many questions which arise at sea must fall to be decided by the common law, or failing this, by no law at all.

‡In *R.* v. *Keyn*, Cockburn C. J. uses the expression "allegiance to the law".

*This date is given in the "New Encyclopedia" as that of the last occasion when outlawry was resorted to. The subject will be more fully discussed at a later stage.

BRITISH SHIPS ON THE HIGH SEA

General principles of law applicable on board ship.

Speaking broadly, so far as ships and persons on board them are concerned, there are three general principles governing the application of law to them.

First : the common law applies on board :

Secondly : there is a body of legislation specially applicable to ships at sea, part of which is the merchant shipping law, and the remainder the extension of the general criminal law to the high sea, or to places within the jurisdiction of the Admiral :

Thirdly : statutes do not apply on board, unless

(*a*) they fall within the previous principle : or

(*b*) they are extra-territorial, applying beyond the realm without limit : or

(*c*) they apply in terms, or are specially extended to them.

I believe this to be the law. The third principle however is given with much hesitation, for it is at variance with an opinion sometimes enunciated, and requires much consideration.

Ships, it is said, are part of the territory of the country to which they belong : *i.e.* in which they are registered : more properly, of the country whose flag they are entitled to fly.

This is what has been called the " floating island " theory, already noticed in so far as the nationality of persons born on board ship is concerned. The leading case on the point is *R.* v. *Anderson* : and it is necessary to give a brief analysis of the decision.

[Part I, p. 45.]

[L. R. 1 C. C. R. 161.

An American citizen, serving on board a British ship, caused the death of another American citizen, serving on board the same ship, under circumstances amounting to manslaughter, the ship at the time being in the river Garonne, on her way up to Bordeaux, which is 90 miles from the open sea. The river was within the boundaries of the French Empire : and the ship was about 45 miles up the river, but at a place below bridges, and where the tide ebbed and flowed, and great ships went. The river was half a mile wide, and the ship was 300 yards from the nearest shore.

Principles laid down in *R.* v. *Anderson*.

The following principles were laid down by the Court of Crown Cases Reserved :—

i. All seamen, whatever their nationality, serving on board British ships, are amenable to the provisions of British law.

ii. The ship was within the Admiralty jurisdiction of Eng-

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land, which extends over British vessels when they are sailing on the high sea, and also when they are in the rivers of a foreign country, at a place where the tide ebbs and flows, and where great ships go.

iii. The offence having been committed within the Admiralty jurisdiction, the Central Criminal Court would have stood in the same position as if it had been committed within its jurisdiction on land.

[*now* M. S. Act, 1894, s. 687.]

iv. Under these circumstances, it was unnecessary to consider the effect of s. 267 of the Merchant Shipping Act, 1854, which gave jurisdiction over the crew of British vessels in foreign ports.

v. If the case had turned exclusively on that section, it would have been necessary to consider whether legislation for a person on board ship admittedly within French territory, more especially having regard to its extension to foreign sailors three months after they had left the ship, was within the power of Parliament : or whether such a provision would not have to be construed " according to the principles of international law", and so confined " to a British subject, or persons subject to British protection ".

On the mere statement of these principles certain considerations arise :—

These principles considered.

As to i. This clearly must be stated in more general terms, and cannot be limited to seamen.

As to ii. The Admiralty jurisdiction in places where the tide ebbs and flows in foreign rivers, cannot oust, but must be concurrent with, the jurisdiction of the Courts of the foreign country, unless under the circumstances of any given case that jurisdiction is renounced.

As to iii. The Central Criminal Court convicted on some definite law : and the principle must be equally applicable to some more modern offence than murder : *e. g.* an offence against the Post Office Acts.

†[M. S. Act, 1894, s. 686 :— jurisdiction in case of offences on board ship.]

As to iv. If, for the reason given, it was not necessary to consider the difficulties which arose under this section of the Merchant Shipping Act, and the question of international law involved in it, neither would it be necessary in any case to consider the more simple section† of that Act which gives general jurisdiction over all persons on board a ship on the high sea.

As to v. It is clear that this special section of the Act does

raise a difficult question of international law, and jurisdiction of Parliament: but the same question must also arise in connection with the jurisdiction of the Admiral itself; for, whether that depends on statute or not, it is nevertheless a claim of jurisdiction over persons, subjects or others, under the flag, but admittedly within foreign territory.

The manslaughter having been committed on board, the fact that a wider jurisdiction was claimed by the section of the Act, was irrelevant to the issue. The fact that the Court dealt with the argument seems to show that the principles *iv.* and *v.*, were not specially directed to the provision which affects foreign sailors.

All these points form the centres of discussion in the following chapters.

R. v. *Anderson* decided in 1868, was followed in 1882 by *R.* v. *Carr*. The facts were these: certain bonds were stolen from a British ship lying afloat, but moored to the quay, in the river at Rotterdam, 16 or 18 miles from the sea, below bridges, and within the ebb and flow of the tide. The bonds were afterwards wrongfully received in England by the prisoners with a knowledge that they had been thus stolen.

[L. R. 1 C. C. R. 161.]

[L. R. 10 Q. B. D. 76.]

The Court of Crown Cases Reserved declined to accept the limitation of *i.* to seamen, and did not touch upon the question as it was affected by statute. It may be doubted, with all respect, whether the decisions may be taken as entitled to greater weight than their position in the development of the subject gives them—a development which has been very slow, if we are to judge it by the fact that the question whether the application of the law whatever that law may be on board ship is limited to seamen, was still regarded as an arguable point in 1882.

But underlying the decision in *R.* v. *Anderson*, was the fundamental idea that a ship is a "floating island".

The "floating island" theory:

"I retain the opinion I expressed at the trial. I told the jury that the ship being a British ship was, under the circumstances, a floating island where British law prevailed: that the prisoner, though an alien, enjoyed the protection of British law, and was as much subject to its sanctions, as if he had been in the Isle of Wight". (Byles, J.)

"There are a vast number of cases which decide that when a ship is sailing on the high seas, and bearing the flag of a particular nation, the ship forms a part of that nation's country, and all persons on board

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of her may be considered as within the jurisdiction of that nation whose flag is flying on the ship, in the same manner as if they were within the territory of that nation." (Blackburn J.)

If the ship is territory, using the term as a fact and not as a metaphor, it hardly seems necessary to dwell on the "protection of the flag", for the flag would then be no more than the indication of territory. The law of the high sea would certainly be simplified, and might be stated thus: the jurisdiction of the Admiral was created, and afterwards transferred to the Central Criminal Court, in order to reach certain floating portions of the territory beyond the jurisdiction of the Courts, which ends with the limits of the counties.

The consequences of the floating island theory have not been worked out with sufficient completeness to warrant its acceptance without further examination. Not only would the common law apply on board, but also all statutes automatically. Yet this is certain, that if the ship goes above bridge, she would suddenly lose her national character, pass within the sole jurisdiction of the foreign country, and the common law and the statutes cease to apply, save in so far as discipline on board is concerned.

Again, even though ships are said to be territory, civil process cannot be served on board: for the civil principle corresponding to the county limit of criminal jurisdiction, is that the King's writ does not run beyond the sea. Neither can extradition warrants be executed on board.

It seems more than probable that the rule as to the civil writ, as to the county limit of criminal jurisdiction, and as to the territoriality of Acts of Parliament, are all variations or applications of the same principle, which is expressed more generally as the territoriality of the sovereignty. Out of the jurisdiction of the Courts, but within the normal jurisdiction of Parliament is an anomaly: but one which must exist if ships are territory: for both the civil and the criminal rule of jurisdiction are inelastic.

But it is very doubtful whether the floating island theory has ever been advanced except in respect of the application of the criminal, or quasi-criminal, law. Cockburn C. J. gave it very qualified approval in *R.* v. *Keyn*, limiting himself to the words "it has been likened". And in the same case, Lindley J. treated

[1] L. R. 2 Ex. D. at p. 161.

it as merely a metaphorical expression, giving reasons why it was not true strictly, and explaining the application of the common law on board ship by the very simple reason, that "otherwise the persons on board would be subject to no law at all".

Yet, unless a ship is territory, *Marshall* v. *Murgatroid* was wrongly decided.* [L. R. 6 Q. B. 31.]

NOTE.

It will be convenient to set out at this point Lindley J's summary of reasons why merchant ships cannot be considered territory.

Lindley J's summary of reasons against the "territoriality of merchant ships": *R.* v. *Keyn*. [L. R. 2 Ex. D. at p. 93.]

"This contention renders it necessary to investigate the doctrine that a merchant ship is part of the territory of the country whose flag she bears.

"It is obvious that she is not so in point of fact; and it is easy to show that the doctrine holds good to a very limited extent indeed. First, it is admitted that a foreign merchant ship, which enters the ports, harbours, or rivers of England, becomes subject to English law, her so-called territoriality does not in that case exclude the operation of English law: ***Cunningham's case***.

[28 L. J.: M. c. 66: *cf.* Part I, p. 14.]

"Secondly, it is conceded that, even in time of peace, the territoriality of a foreign merchant ship, within three miles of the coast of any State, does not exempt that ship or its crew from the operation of those laws of that State which relate to its revenue or fisheries.

"Thirdly, in time of war the so-called territoriality of a ship of one of the belligerents does not subject it to invasion or capture within three miles of a neutral coast.

"Fourthly, in time of war so-called territoriality of a neutral merchant ship does not exempt it from invasion in search of contriband of war.

NOTE on "territoriality of merchant ships" *contd*.

"Fifthly, in time of war this country has invariably denied that the territoriality of a neutral merchant ship protected enemy's goods on board: and although England has agreed with some nations that in future free ships shall make free goods (unless contraband of war), England resolutely maintains the old doctrine against all other nations.

"In all these cases the territoriality of the ship becomes an unmeaning phrase, and care must be taken not to be misled by it, and not to allow the general assertion that a ship is part of the territory whose flag she bears to pass unchallenged, and to be made the basis of a legal argument.

"When, indeed, a ship is out at sea in waters which are not the territorial waters of any State, it is right that those on board her should be subject to the laws of the country whose flags she bears: for otherwise they would be subject to no law at all. To this extent a ship may be said to be part of the territory of the country of her flag (see Manning, Law of Nations, pp. 117-255): but so to speak of her is to employ a metaphor, and this must never be lost sight of."

* I do not know of any other case in which the question whether statutes apply automatically on board ship has been discussed: it has therefore been necessary to treat it as the leading case, although the judgment was of the shortest. Its date is 1870, that is, two years after *R.* v. *Anderson*. Blackburn J. gave a judgment in both cases.

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Nationality of children born under the flag at sea.

[*cf.* Part I, p. 45.]

This case has already been referred to in connection with the nationality of children born on British ships on the high sea, and there seemed no difficulty in coming to the conclusion that their nationality is British, on account of their having been born under the protection of the flag. Conversely, the nationality of children born on board foreign ships, though of English parents, would fall to be decided by the statutes 4 Geo. II, c. 21, or 13 Geo. III, c. 21, as the case might be. But the question which arises under the Bastardy Act is more difficult. The Act 7 & 8 Vict. c. 101, s. 2, refers simply to a woman "delivered of a bastard child": in accordance with ordinary principles, this means delivered within the area to which the Act applied: in this case England and Wales.†

Extension to high sea of statutes limited to part of United Kingdom.

This limitation of the Act to a part of the United Kingdom of itself shows how difficult the question before us really is: for, as was before suggested, there can be no reason for limiting this extension high-seawards to statutes only applicable to England. The principle must also apply to statutes applicable to Scotland, or to Ireland, alone. The only alternatives are that statutes applicable to one part of the United Kingdom extend either to ships registered in that part, or to persons belonging to that part by birth. There is no trace of the existence of either rule. Yet the general application of such statutes might not only be contrary to the intention of Parliament in imposing the limitation, but might also lead to conflicts where the law differed in England and in Scotland.

But putting this question one side, there can be no doubt that above bridges in the rivers of a foreign country the protection of the flag is not even claimed, except in matters of discipline. Such a temporary application of Acts of Parliament to the same locality seems hardly consistent with their nature.

Similar difficulties in application of common law.

It may be said that precisely the same difficulties arise with reference to the application of the common law on board. This is true, even to the extent of the differences between the common law of England and Scotland. But if we accept Lindley J's reason for the application of the common law—that otherwise there would be no law at all—and if we bear in mind that not the common law law only, but also the whole of the criminal law is ex-

† This point remains the same under the Bastardy Laws Amendment Act 1872—35 & 36 Vict. c. 65, s. 3.

tended on board, the common affairs of daily life are practically covered by the law : and the same reason does not seem to call for a similar temporary application or extension of the statute law.

The Merchant Shipping Act covers a certain amount of the ground, and also certain special statutes dealing with persons on board ship—such as formerly the registration of births and deaths at sea, under 37 & 38 Vict. c. 88, s. 37 :† and, still, the making of wills at sea by seamen, under the Statute of Frauds, s. 23. And there is a certain body of statutes which, though not specially extended, yet from the force of circumstances must apply to transactions concluded on board, but which cannot take effect till the persons reach the shore : such as the law applicable to bills of exchange, and to stamps. But beyond this it does not seem possible to go.

† now dealt with by M. S. Act, 1894, s. 254.]

It is submitted that " floating island " as a legal expression is erroneous. If it were sound legally and imported legal consequences, it would have been sufficient to decide *Anderson's case*, and all the rest of the argument would have been unnecessary. " Floating Colony " is perhaps nearer the mark, if it were essential to find a concise expression, but the analogy would still be incomplete. Either term is but a metaphor : and as such useless and misleading, and ill-adapted to the strict purposes of law.

The only statement which seems possible is that ships upon the high sea are neither territory nor Colony, but only what they profess to be—ships : with a law peculiar to themselves, which it must be our purpose to unravel.

British ships in territorial waters.

The position of British ships will not be altered in this respect when they come within the territorial waters of the United Kingdom ; but the provisions of the Act of 1878, provides one more argument against the territorial theory of ships. The fact that the sanction of the Secretary of State is required before a prosecution for an offence on board is commenced, in the case of a foreigner, is so large a derogation from the ordinary law of the land, that it can hardly have been in contemplation of the Legislature that such a provision was being enacted for crimes committed on territory of the United Kingdom.

The foregoing suggestion does not deny the broad principle given by Cockburn C. J. in *R.* v. *Keyn*, that —

[L.R. 2 Ex. D. at p. 161.]

"By the received law of every nation a ship on the high seas carries its nationality and the law of its own nation with it. All on board, therefore, whether subjects or foreigners, are bound to obey the law of the country to which the ship belongs, as though they were actually on its territory on land. But they are liable to that law alone."

It is a question for each country to determine how much of its law shall be in force on board its own ships. The fact that there is a doubt whether the English statutes apply on board English ships in no way militates against the existence of the general rule: which perhaps should be better stated thus—Ships on the high seas are subject to the Legislature of the flag: which however may be contracted for convenience into the "law of the flag", so long as the fundamental idea is not lost sight of, that it does not *necessarily* imply that all the law of the flag is applicable.

But this rule is not exclusive, at least so far as English principles are concerned. It will be seen hereafter that some extra-territorial legislation applies to British subjects on board foreign ships on the high sea: in one case expressly, and in others by necessary implication from the general nature of the extra-territorial language used. It is obvious that if legislation for British subjects in foreign countries stands justified by allegiance, legislation applicable to British subjects on foreign ships needs no fuller justification.

It will be necessary in due course to consider the effect of such legislation. For the moment it is only necessary to note the fact that this exception exists to the general rule as stated by the Lord Chief Justice, and that the last sentence should be omitted.

SHIPS IN FOREIGN HARBOURS.

When ships leave the high seas and enter foreign harbours or other dominion waters, questions of considerable difficulty arise. Does the jurisdiction of the Legislature of the flag absolutely prevail? or does it absolutely cease? or does it continue to some limited degree by general consent? In other words, we come to the examination of a question which puts the "floating island" theory to the touch: What in fact is the law governing ships in foreign ports?

Ships of war, it is conceded, enjoy the privilege of exterrito-

riality in foreign waters ; and this principle was occasionally extended to foreign mail ships prior to 1891, the status of ships of war being granted by legislation†

Status of mail ships by convention.

The status of mail ships was dealt with by the Imperial Parliament, by the Mail Ships Act, 1891, which was passed in order to enable certain privileges to be granted by convention to ships engaged in the postal service. The conditions that any vessel should become an " exempted mail ship ", are that the owner is subsidized for the execution of postal service by a foreign State, and gives security to the satisfaction of the High Court to meet claims which may be made against the ship. The consequence of the exemption, so far as the ship is concerned is, by s. 5, that she is not

54 & 55 Vict. c. 31, s. 5.

liable to be arrested or detained by any arresting authority either for the purpose of founding jurisdiction in any Court of Admiralty, or of enforcing the payment of any damages, fine, debt, or other claim or sum, or enforcing any forfeiture, whether arising from the misconduct of the master or any of the crew or otherwise.

The provision more particularly affecting the subject in hand is s. 4, which regulates the arrest of persons on board when the exempted mail ship is in a port in the United Kingdom.

54 & 55 Vict. c. 31, s. 4.

Provisions of the Act as to arrest of persons on board.

Arrest and execution of process on board exempted mail ships.

(1) Where this section applies to a convention with a foreign State, and an exempted mail ship to which this section applies is in a port in the United Kingdom no person shall be arrested without warrant on board such ship, and before any process civil or criminal authorising the arrest of any person who is on board such ship is executed against that person the following provisions of this section shall be observed ; that is to say,—

(*a*) written notice of the intention to arrest a person who is, or is suspected to be, on board the ship, stating the hour at which, if necessary, the ship will be searched, shall, if it is a ship of a foreign State and there is at the port a consulate of that State, be left at the consulate addressed to the consular officer :

(*b*) it shall be the duty of the master upon demand, if the said person is on board his ship, to enable the proper officer to arrest him :

(*c*) if the officer is unable to arrest the said person he may, but if it is a foreign ship only after the expiration of such time after notice was left at the consulate as is specified in the convention, search the ship for such person, and if he is found may arrest him.

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†Thus in Mauritius, by Ordinance No. 1 of 1886, it was provided that the steamers of the " Messageries Maritimes ", which carried the regular mail service of the Colony, should, in the ports and waters of the Colony, "be considered and treated as vessels of war, and be entitled to all the rights, privileges, and immunities of vessels of war," and should not " for any cause be diverted from their special duties, or be liable to seizure or detention by order of any Court or Judge ".

The Ordinance was a temporary one, and by proclamation ceased to be in force on 1st. May, 1890.

(2) The ship may be delayed for the purposes of this section for the time specified in the convention, but not for any longer time.

(3) If the master of a ship refuses to permit a search of the ship in accordance with this section, any officer of Customs may detain the ship, and such master shall be liable to a fine of £ 500.

(4) This section shall apply to the arrest of the master in like manner as in the case of any other person.

The Act may be applied to the Colonies.

A convention had been entered into in 1890 between Great Britain and France, article V of which deals with the same subject.

Provisions of Art. V. of Mail Ships Convention between France and Great Britain.

When the packets employed by the French postal administration and by the British postal administration are national vessel owned by the State, or vessels belonging to companies subsidized for the execution of postal service, such packets cannot be diverted from their destination, nor be liable to seizure, embargo, or "*Arrêt de Prince*".

Passengers on such packets, who may not desire to go on shore during the vessel's stay in a port of either State, cannot be on any account taken from on board.

Nevertheless, the local authorities may claim the expulsion from on board of persons wanted in pursuance of a regular warrant for any crimes or offences who may have taken refuge or embarked in mail boats, and, in case of necessity, searches may be carried out on board such vessels by the competent authorities. The individuals in question shall then be handed over to them.

It is, however, agreed that the authorities cannot proceed on board unless they have previously given notice, at least one hour before the search, to the consulate or vice-consulate, in order that the Consul or Vice-consul, or his delegate, may be present at the searches in question. The letter giving notice shall be addressed to the Consul or Vice-consul, and shall state the exact hour, and if the agent neglect either to appear in person, or to be represented, the proceedings shall go on in their absence.

The execution of such measures shall not delay the departure of the vessel for more than an hour after the time of departure fixed in the time-tables of the company, which must be duly communicated by the respective companies to the authorities of each port of call.

The present article shall not apply to packets entrusted with a mail service and belonging to companies subsidized by either State, until a bond has been entered into, once for all, by the said companies to satisfy, after due hearing and definite decision, the legal consqeuences of any liability incurred either by the captains of their packets or by the companies themselves.

The aforesaid bond must be guaranteed by a security within the jurisdiction of the tribunals of the country in which the bond may have been entered into.

Merchant vessels.

We proceed now to deal with merchant ships. It would seem to follow that, sovereignty within the realm and its waters being absolute, just as foreigners coming within the realm are subject to that sovereignty, so foreign ships coming within the realm are, together with all on board, also subject to that sovereignty.

There can be no doubt that such is the general rule, and that it may be enforced in all its consequences: thus, service of civil process, or a search for a criminal on board, warranted by the law of the harbour, could not be regarded as a violation of the flag. There is however a well-known exception to it with regard to discipline on board ship, which, it is said, remains controlled by the law of the flag. The choice of words is here somewhat difficult: it is impossible to use the form "it is agreed" with regard to a question of which no single detail is settled, even leaving out of sight the fact that all are not agreed as to what the rule really means. There is a general agreement that in foreign harbours discipline on board ship, and punishment for breaches of discipline, are to be determined by the law of the flag: but there is no agreement as to whether the law of the flag prevails to the complete exclusion of the law of the harbour: nor is there any settlement as to the existence or scope of any of the subordinate rules for putting the main principle into force.

Questions of discipline to be determined by the law of the flag.

Now, the settlement of such a question refers to one of two things: either the settled practice of the English Courts, or an agreement come to between all or even some States. There are a few conventions on the subject, but England is not a party to any of them. And of authority to be derived from the practice or judgments of the Courts there is practically none.†

The examination of this rule would naturally involve the following questions: first—To what extent are the Courts in England prepared to recognise an assumption of jurisdiction by a foreign State? and secondly—What is the law of England with regard to English ships in foreign harbours?

In the absence of any authorities on the subject it is difficult to say with precision what the English rule is. But there are certain *dicta* to be found from which it may be assumed that as a general principle, the right of the law of the flag to regulate discipline on board foreign vessels in British ports will

†The reason for this, at least so far as the Colonies are concerned, may possibly be, that questions which arise out of the enforcement of discipline on board ship in a colonial harbour are for the most part, if they go to Court at all, taken before a Police Magistrate. They are either dismissed or dealt with summarily. Captains wisely avoid further litigation: the men cannot afford it: and if the matter is taken up by the Consul, it is either arranged amicably by the Law Officers, or referred to the Foreign Office for settlement. It is curious, however, that a question which must be of daily occurrence should not have been frequently discussed in the Courts in England.

Chapter I be recognised : but not to the exclusion in all respects of British law.

[L.R. 2 Ex. D. at p. 202.] Cockburn C. J. in *R.* v. *Keyn* said that an instance of the assent of nations, implied from established usage

" is to be found in the fact that merchant vessels on the high seas are held to be subject only to the law of the nation under whose flag they sail : while in the ports of a foreign State they are subject to the local law as well as to that of their own country".

[*ib.* at p. 82.] Sir R. Phillimore, in the same case, said :—

" A foreign merchant vessel going into the port of a foreign State subjects herself to the ordinary law of the place during the periods of her commorancy there : she is as much a *subditus temporaneus* as the individual who visits the interior of the country for the purposes of pleasure or business.

" It may be that the foreign State, influenced by considerations of public policy or by treaty obligations, chooses to forego the exercise of her law over the foreign vessel and crew, or exercises it only when they disturb the peace and good order of the port. This is the course which France has usually pursued : an illustration of it is furnished by the case cited from Dalloz (Juris Gen. 1859, "Cour de Cassation", pp. 88, 89), the result of which is correctly stated in the marginal note.

> " Les bâtiments de commerce étrangers, stationnant dans un port français, sont soumis à la juridiction territoriale pour ce qui concerne les délits entre étrangers et notamment entre gens de l'équipage, dont la répression n'intéresse pas exclusivement la discipline et l'administration intérieure du bord : C. Nap. 3 : Av. Cons. d'Et. 20 Nov. 1806.
>
> " Il en est ainsi surtout, lorsque ces délits sont de nature à compromettre la tranquillité du port, ou lorsque l'intervention de l'autorité locale a été réclamée."

These opinions coincide with the following statement by Ortolan :

" Les navires de commerce, jouissent pour certains faits, du bénéfice de l'exterritorialité, et pour des autres, ils n'en jouissent pas.....Ces navires particuliers, bien qu'ils restent régis, pour ce qui concerne exclusivement leur régime intérieur, par les lois de leur pays, ne sauraient être soustraits entièrement à l'action de la puissance publique du territoire sur lequel ils sont pour l'exécution des lois de police et de sureté et autres lois générales de même nature en vigueur sur ce territoire. "

But assuming that this exception to the otherwise supreme law of the harbour is a recognised principle of English law, we are left completely in the dark as to the details of its application.

What, for example, ought to be included in the term "*régime intérieure*"? What in "discipline", which may refer solely to the relation of the captain and his crew: or may include the authority which he has over the passengers? The Cour de Cassation excludes "*délits entre gens de l'équipage*" from the jurisdiction of the flag. Then again, these authorities do not touch the difficult question whether the two jurisdictions exist side by side, or are, within their own provinces, mutually destructive.

Doubt as to meaning of "discipline".

On one point Sir R. Phillimore gave a positive opinion— [L. R. 2 Ex. D. at p. 83.]

"I cannot entertain any doubt that in this country a foreign sailor, complaining of ill-treatment of his master on board a foreign ship in an English port, would be entitled to the protection of an English Court of Justice".

But a complaint of "ill-treatment" may often arise in consequence of the infliction of legitimate punishment for breach of discipline: legitimate, that is to say, by the law of the flag, but illegitimate as judged by the law of the harbour. The proposition would seem to suggest that the law of the flag, even on questions of discipline, is subordinate to the law of harbour.

The Cour de Cassation suggests a still more difficult point: that the local authorities may be asked to intervene to aid in enforcing discipline. So far as English law is concerned, if this refers to the Police, the authority must be found in the local law: if to the Magistrates, they can only enforce the law: which would be neither the foreign merchant shipping law, nor the English Merchant Shipping Act, but only the criminal law which they enforce every day.

Intervention of local authorities.

The question is one of such an intricate nature that it requires, not a few pages of writing, but innumerable decisions to solve, some negative, some affirmative, until the line becomes clearly visible. In the absence of decision there is nothing but conjecture: the question being however an eminently practical one, it is not possible to leave it in its present vague condition without making some attempt to solve it.

Suppose then, a foreign ship in an English harbour, and a sailor on board punished for a breach of discipline by the captain in a way which amounts to an offence by English law.

It is the custom to look on the disciplinary power of the captain in a foreign harbour, which it is admitted he has, as flowing from the flag. But this explanation of the rule is unsatisfactory and unconvincing.

Examination of concrete cases of punishment for of discipline.

Take the following case—suppose the law of the ship to allow of so severe an application of the cat, that in the instance a sailor succombed from his injuries and died. The inevitable tendency of the mind would be towards such a phrase as "it is manifest" or " no one could deny ", that the captain would be triable for murder, or at least manslaughter, and that the defence that the law of the flag sanctioned the infliction of that punishment to the bitter end would not prevail in an English Court.

But take a lesser form of punishment, as the moderate use of the cat for an ordinary offence, which did not coincide with the English rule as to infliction of corporal punishment : or, a simpler case still, the infliction of reasonable corporal punishment for disorderly or riotous conduct such as might be inflicted on board an English ship. Here again the tendency of the mind would be to say that an action for assault would lie in the English Courts in the first case, but not in the second.

A conclusion dependent only on the tendency of the mind must not be taken for law : though it must be confessed that the law as laid down in cases *primæ impressionis* is not seldom influenced by such tendency.

Let us pass, however, to the other extreme in the scale of punishment, the infliction of a fine and its deduction from the seaman's wages, and afterwards an action for money due brought in the English Courts. There can be little doubt that in such a case the seaman would not recover : and there can be little or no doubt that the judgment would be based on the existence of an agreement between the master and seaman : and this even assuming the agreement not to form part of the seaman's articles as in England, or that there was no express stipulation to submit the question to, and accept the decision of, the Consul or other officer of the flag abroad, as final.*

Recognition of agreement between master and seaman.

It does not seem impropable that agreement, express or implied, between master and sailor, and not the assertion of the law of the flag, lies at the root of the whole question. We should not expect to find in the articles of agreement an express reference to corporal or other punishment. But the law is that such punish-

* A scale of fines is inserted in English articles, the most important of which amounts to 2 weeks pay for absence from the ship at any time without leave.

The clause as to settling disputes runs as follows—

" It is hereby mutually agreed, that any disputes arising on the subject of these deductions shall be settled by the Superintendent of a Mercantile Marine Office, Consular Officer, or Shipping Master abroad, and that the decision shall be final."

ment, so long as it is reasonable, may be inflicted by the master ; and an agreement to serve is an agreement to serve under the conditions imposed by law upon the service : and therefore an agreement that the rights resulting from the service shall be regulated by that law : and this whether the question is submitted to to a national or a foreign tribunal.

If proceedings were brought in an English Court in respect of some severe punishment inflicted on board a foreign ship at sea, the decision could not but be based on a similar agreement to be bound, not by the law of the flag, but by the decision of the officer appointed to maintain discipline by the law of the flag.

Does the case alter in its nature when the proceedings are in respect of some punishment inflicted on board after the vessel has arrived in an English port ? The English law is then in force, and it seems impossible to contend that it should decline to interfere when an act which it considers unlawful is committed. It cannot wholly stand by. Nor can it wholly assert itself, for that might be to impose conditions quite foreign to the agreement of the seaman's services. The *via media* seems to be this : that the law of the flag cannot be asserted as of right, and in opposition to the law of the harbour ; but that the law of the flag is allowed independent action, based on the agreement between the parties, and so long as the law of the harbour is not violated.

Suggested rule : the law of the flag allowed to operate so long as the law of the harbour is not infringed.

Agreement seems altogether to be a more satisfactory basis for the rule, than a very qualified recognition of the flag, which seems hardly consistent with its importance and dignity. But it is not, nor does it profess to be, completely satisfactory ; and it is only put forward as a suggestion for a basis on which further principles might ultimately be worked out.

It appears to settle this point satisfactorily, that an agreement to submit to the infliction of punishment which, by the law of the harbour, is a crime, would be no defence to the charge. Thus the " agreement " of the sailors might contemplate stringing up at the yard-arm : but no one would deny that although the infliction of such a penalty on the high seas could not concern an English Court, yet that off Erith it would not be tolerated. It is hardly doubtful that the jurisdiction in a case of actual murder would not be transferred from the local tribunals to the captain

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of a ship, even if punishment by death were claimed as part of the disciplinary rules of the ship by its own law.

The same principle would probably be applied to a case of undue corporal punishment. But again the tendency of the mind would be to admit the justice of reasonable corporal punishment in extreme cases. The suggestion therefore becomes inevitable, though it is probably unsound logically, that the English Courts, in cases where the facts do not speak for themselves, would adopt the standard of the English law under analogous cases‡.

This rule would also extend to the passengers in cases of breach of passenger discipline, at least on board ships where the same principle obtains as in English law. The captain's jurisdiction over the passengers results from agreement on the part of the passenger to submit to the reasonable orders of the captain, and to punishment for disobedience. And indeed there does not seem much reason why this should not be the law.

Appeals to local authorities for assistance.

Finally, we come to the question of appeals to the local executive, or to the local Courts, for assistance. That such appeals may be made is the logical consequence of the assertion of supremacy of the law of the harbour. An appeal by a sailor to be relieved from, or to be saved from, punishment, would in all probability be treated as a similar appeal by a foreigner within the protection of the law; and the taking of legitimate steps to enforce the protection of the law, or the judgment of the Court, could not be looked upon as a violation of the rights of the flag.

An appeal by a master who finds himself unable to enforce his own law of discipline raises questions of difficulty. In quelling a disturbance on board ship the local police would undoubtedly interfere, as it would fall within their regular duties to preserve

‡ The following English decision bears upon the question and illustrates the opposite case, where the law of the harbour sanctioned a punishment in excess of that allowed by the law of the flag.

[31 Rev. Rep. 714.] In *Aitken* v. *Bedwell* a seaman was guilty of mutinous conduct on board an English ship in the port of Odessa. The captain sent on shore for assistance and the seaman was given in charge of some Russian soldiers. He was then flogged, the captain ordering the punishment. In an action against the captain it was contended on his behalf that what had occurred on board was a breach of Russian law, and that what had happened on land was done with the authority of the Russian Government.

Lord Tenterden left the following question to the jury—"If you think that the defendant merely preferred his complaint, and left the constituted authorities to act as they thought fit, the defendant is entitled to your verdict. If, on the other hand, you think he did more, and was active in promoting and causing the punishment to be inflicted, then he is answerable in this form of action." There was a verdict for the plaintiff, with £ 25 damages.

the peace of the harbour. The direct intervention of the local police however would necessarily be governed by the same rules as their intervention in ordinary cases. And so, if the local Courts were appealed to to punish a breach of discipline, the enquiry would inevitably be limited to ascertaining whether any breach of the local law had been committed.

THE JURISDICTION OF THE CONSUL.

There is however another authority, the Consul, who is invested with jurisdiction to settle difficulties which arise on shipboard. His powers are sometimes settled by convention: but he has certain powers independent of express arrangement which are inherent to his office, which dates from the time when ships first sailed the sea.

I do not propose to go into the matter at any length, but only to touch upon that part of it which bears on the present question. The Consul, in virtue of his power to settle disputes which arise on board ship, is the tribunal of the flag, established by consent of the foreign country at the port, to which masters and sailors can* resort for the settlement of their differences.

The Consul the tribunal of the flag in foreign ports.

Unless there is something special in the convention, it is clear that the presence of the Consul at a port does not in any way alter the relation of the law of the flag to the law of the harbour, and that this question remains therefore unaffected. In order to illustrate the manner in which the powers of the Consul are dealt with in conventions, it will be instructive to set out the 8th. article from the one concluded between France and the United States in 1853.

The respective Consuls-general, Vice-consuls, or Consular Agents, shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captain, officers, and crew without exception, particularly in reference to the adjustment of wages, and the execution of contracts. The local authorities shall not, on any pretext, interfere in these differences, but shall lend forcible aid to the Consuls when they may ask it, to arrest and imprison all persons composing the crew whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the Consuls, addressed in writing to the local authority, and supported by an official extract from the register of the ship, or the list of the crew, and shall be held during the whole time of their stay in port at the disposal of the Consul.

*There is an interesting group of cases dealing with the question when the Consul's jurisdiction is compulsory; these however do not concern the point under discussion.

Chapter I ...Their release shall be granted at the mere request of the Consuls made in writing. The expenses of the arrest and detention of these persons shall be paid by the Consuls.

[see Forsyth's "Cases in Constitutional Law", p. 407.]

A great deal is settled by this article, but not everything : and it will be seen by reference to the opinion of Mr. Cushing the United States Attorney General in the case of the "*Atalanta*", that the interpretation of "internal order" is still far from precise.

What is internal in this context ? Plainly it seems to me everything which does not appertain, either by the law of nations or the municipal law, to the local jurisdiction. If the acts of *disorder*, if the "differences", be matters of local jurisdiction, then, as *questions*, they are jurisdiction external to the ship. Apply the test to this or any other case of the same principle and it reconciles all controversy. Where there is in what occurs on board the ship no infringement of the laws of France, or of the United States, there the local authority has no concern in the matter, save, in the terms of the article, to support the Consul, in maintaining the authority and executing the laws of his own Government.

The facts of the case were these :—

The French authorities at Marseilles at the request of the United States Consul received and imprisoned on shore some of the crew of the United States ship "*Atalanta*", charged with acts of insubordination and violence on the high seas. On the application of the Consul some were released, and some were again put on board the "*Atalanta*", for conveyance to the United States for trial. With notice to the Consul, but in spite of his remonstrances, the French authorities then went on board and resumed possession of the men and imprisoned then on shore.

The article of the French Convention with United States examined.

Quite apart from the question of interpreting the convention, this opinion of the Attorney General is important as he reviews the general question independently of the convention.

Mr. Cushing adopts the view of Ortolan that ships

"when they are in the territorial waters of a foreign State, are not exempt from the local police and jurisdiction, except as to facts happening on board which do not concern the tranquillity of the port, or persons foreign to the crew. For all other facts they remain subject to this police and this jurisdiction".

The French law however, does not act on the opinion of the jurist in the opposite case, for it does not

"hesitate to prescribe that when crimes are committed on board a

French vessel in a foreign port, by one of the crew against another of the same crew, the French Consul is to resist that application of the local authority to the case."

He came, however, to the conclusion that the local authority was entitled to assert itself in regard to crimes committed on board a merchant-man in the harbour: but he denied

"that the local authority had any right to interfere with persons lawfully detained on board the ship by the laws of the country to which she belongs, as for a crime committed on the high seas among members of the crew, and not justiciable by the foreign jurisdiction."

Offence committed at sea:

The offence was not committed in the foreign harbour, but on the high seas. There can be little hesitation in accepting the conclusion of the learned Attorney General that the local authorities could have no inherent jurisdiction in such a case, but that the only action which could be taken by them was by request of the Consul and in virtue of the Convention.

The local Executive can only move when the local law is violated: in this case, if the Consul had not moved, the only thing which had occurred was the fact that a sailor was lying in irons on board a ship in harbour, and with this the local executive could have nothing to do.

possible redress for illegal detention.

This does not deny the possible right of the Courts to interfere: and it is not improbable that if it were shown to the Court that this detention was contrary to English law, guided by the rules of recognition of the law of the flag, some form of redress, whether by *habeas corpus* or other means, would be found. To the argument that the detention was justified by the law of the flag, and that the offence was committed on the high sea, the answer would probably be given: Do what your law allows you on the high seas, but conform to the law of the harbour when you come to port.

So the jurisdiction of the Consul drops out from the question, and we come back to the point from which we started. The learned Attorney General himself, while asserting a rule which applies only to offences committed outside of the harbour, admitted that if the acts of disorder do fall within the local jurisdiction, that jurisdiction is not ousted.

Thus, the questions where there is a convention are the same as where there is none: What is the meaning of "internal order"? What is the meaning of discipline? How is either term to be

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defined in order that the occasions when the interference of the local authorities is justified may become clear and well-understood? The opinion of Mr. Cushing supports the view that matters arising on board which are dealt with by the local law cease to be *questions of internal order*, because, on the hypothesis, they are treated as questions of order *external* to the vessel, as questions affecting the public order of the local community: therefore they did not, in his view, fall within the exclusive privilege of the flag, and jurisdiction of the Consul, granted by the convention: nor can they fall within that privilege and that jurisdiction as allowed and recognised by public law.

Questions cease to be of internal order when they are dealt with by the loc law.

Yet this still leaves one point open: What is to be said with regard to the punishment of offences clearly within the purview of "internal order" or "discipline", which, justified by the law of the flag, yet constitutes a breach of the law of the harbour? It is not clear whether the case is contemplated by the article of the convention quoted above: but it is submitted that the conclusion already arrived at is sound. For, if the local law may claim to be respected in questions of disorder, the logical inference is that it may claim the same respect in questions of repression and punishment of disorder.

Punishment must be subject to the same rule.

This discussion may serve as an appropriate introduction to the examination of the English law on the subject; for we must now proceed to the second branch of the enquiry, and ascertain what interpretation our own legislation puts upon the rule of international law which Mr. Cushing stated thus—"Each nation does by the general rule of public law.... concede to the Consuls of the other a certain authority of discipline, and to the ships of the other a certain privilege in its ports": in other words—What authority of discipline for British Consuls, what privileges in respect of British ships, the crews, and persons on board, in foreign ports, are claimed by British law?

ENGLISH LAW AS TO ENGLISH SHIPS IN FOREIGN HARBOURS.

We must now examine the provisions of the Merchant Shipping Act which deal with English ships and seamen on the high sea and in foreign waters: together with certain kindred matters. The sections will be found in the Appendix to this chapter; they deal with the following subjects:—

Powers of arrest and imprisonment for desertion or absence without leave out of the United Kingdom [ss. 223, 224].

Analysis of sections of Merchant Shipping Act, 1894.

Apprehension of deserters, within the dominions, from foreign ships, where due facilities are given by the foreign country for the apprehension of deserters from British ships [s. 238].

Constitution and powers of Naval Courts to hear complaints from seamen, and to make enquiries as to wrecks [ss. 480—485].

Jurisdiction of Courts in the dominions in [s. 685] case of offences [s. 686].

a. By British subjects on board British ships on the high seas or in any foreign harbour :

b. By British subjects on board any foreign ship to which they do not belong :

c. By foreigners on board any British ship on the high seas.

All offences against property or person committed either ashore or afloat out of the dominions by any sailor who is, or within 3 months has been, employed in any British ship, are to treated as if they had been committed within the jurisdiction of the Admiralty [s. 687].

Conveyance of offenders and witnesses to the United Kingdom or a Colony, in the case of offences committed by British seamen on the high sea or out of the dominions [s. 689].

Extension of criminal law on board English ships ;

The first point to be noticed in these sections is the extension of the criminal law to persons on board ship. As we shall presently see, all offences dealt with by the Criminal Law Consolidation Acts of 1861 are, by those Acts themselves, made punishable when committed within the jurisdiction of the Admiralty ; but until those Acts are considered it will not be possible to do more than glance at the provisions of these sections. In the first place s. 686 with deals " any offence ", and is not limited to the general criminal law, but extends to all statutory offences. In the second place it applies specifically to foreigners ; but, in accordance with the recognised principle, the place of commission of the offence is limited to British ships on the high sea. The jurisdiction to try the offences is given to Courts in the Colonies as well as in the United Kingdom.

in foreign harbours.

Section 687 provides that offences in foreign ports are to be treated as offences within the jurisdiction of the Admiralty when committed by persons, whom the marginal note describes as

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" British seamen ", : but whom the text of the section defines as seamen employed in British ships " at the time the offence is committed, or three months previously ". This section, though to a certain extent it covers the same ground as s. 686, does in fact take a wider scope, as it applies to offences committed ashore or afloat by persons who are no longer under the protection of the flag.

Each of these sections raises an interesting question. First : the second case dealt with by s. 686, is practically a surrender of jurisdiction over British subjects serving on board foreign ships, or, to adopt the language of the section, over British subjects on board foreign ships to which they belong : it recognises the agreement of the sailor to serve under the flag.

This is not said in express terms ; but one of the problems to be at some time solved, is, whether the fact of service under a foreign flag is sufficient to oust the operation of any other criminal law applicable to British subjects on the high seas, should the offence fall within that law. It will be remarked that, in so far as it affects British subjects not serving on board, this provision negatives the absolute supremacy of the law of the flag at sea, concerning which there will be much discussion hereafter : it negatives it too when the foreign ship is in harbour in a third State : so far as the law of the third State is concerned, it does not negative it, but becomes concurrent with it. The exception of British subjects serving on board from this general provision, must therefore be some vestige still remaining of the old law of the sea, which for convenience may be rested, as above stated, on the agreement to serve.

Jurisdiction over sailors for 3 months after leaving the ship.

But in s. 687, there is another departure from general principles in the claim to maintain the jurisdiction acquired over sailors by their service, not merely when they are on shore, but also for three months after they have left the ship. This claim is irrespective of nationality. In the first case, the sailor at the time the offence was committed would either have been on shore by leave, or as a deserter : leave or desertion too might cover special cases coming within the 3-months rule. So long as the claim to jurisdiction is only put forward as concurrent with, and not exclusive of, the jurisdiction of the harbour, it is probable that the law of the sea may find a warrant for this extra-territorial legislation. But the jurisdiction extends to cases not covered either

by leave or desertion ; the justification may possibly have to be sought in the archives of the old Sea Courts, should it ever be challenged before the Court of Crown Cases Reserved, more especially in the case of foreigners serving on board British ships. It will be remembered that this was the question left undecided by the Court in *R.* v. *Anderson*. [*cf.* p. 8.]

We are dealing now only with the claim to jurisdiction made by English law, and not with its justification ; and there is a practical question which results from the combined operation of ss. 686 and 687. Does the surrender of jurisdiction, under the former section, over British subjects on board foreign ships to which they belong, extend to a period of 3 months after they had left the ship ? The answer to the question depends on further question : Is it true to say that the law of England recognises claims to jurisdiction by foreign countries identical in principle with the claims which it itself makes in foreign countries ? Signs are not wanting that such is the law : but it cannot be asserted in too positive a manner.

Arrest by master without warrant.

The second point of importance is the power of arrest without warrant given to the master by s. 223, in cases of desertion or absence without leave. When the arrest is within the dominions, the local police are directed to give assistance if required : but when it is out of the dominions, the arrest is expressly made subject to the local law. The section assumes, however, that a warrant will be granted by the local Courts, if the law does not permit the arrest to be made without warrant.

The power to take the offender on board ship instead of before a Court, is made dependent on the wish of the seaman, and it is to be presumed that this assent would be a complete answer to any action taken in the local Court based on want of jurisdiction : it would also probably cover the prior arrest. There is a point however which seems at first sight difficult—how far the directions to the Court given by s. 224, would be accepted by a foreign Court. It seems not improbable that the solution would be that they would be held, in so far as they affected the seaman, to be part of the original agreement between him and the master, and as such would be acted on by the Court.

The arrest of deserters by the local authorities in foreign countries is encouraged by the reciprocal action contemplated

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by s. 238 with regard to foreign deserters in any place without the dominions. Conventions are not contemplated as being essential; the condition of the issue of the necessary Order in Council, with regard to any country, is that it should appear that due facilities are or will be given by that country for recovering and apprehending deserters from British ships.*

Jurisdiction of Naval Courts.

Thirdly: the jurisdiction given to the Naval Courts raises questions of some nicety. There is first the assumption of the right to hold judicial proceedings in a foreign country, and this not necessarily on board ship: and, in addition, there is the power "to administer an oath, summon parties and witnesses, and compel their attendance and the production of documents": and also the right to punish persons who obstruct the hearing of the case.

The first assumption is of questionable validity: the second has been found in civil matters to be, in the case of some countries, an express violation of the local law, and sometimes attended with unpleasant consequences - a question to be referred to at greater length presently.

Apart from these two points, however, the main point involved may depend for its settlement on the broad question whether a law expressed to be extra-territorial in its operation, is not limited to British subjects in the absence of special reference to foreigners. It is probable that the rules which govern such legislation would be held to apply to the sections dealing with Naval Courts; in which case there would be difficulties in summoning other than British witnesses, and a foreigner obstructing the hearing of the Court could not be punished. The point is important, as if either the witness to be summoned, or the obstructer to be punished, were a foreign sailor within 3 months of his leaving the ship, the question already hinted at, whether jurisdiction over foreigners is rightly claimed would arise. If there is no difficulty raised as to the holding of the Court, the local authorities might possibly be looked to to assist in the summoning of witnesses. This, however, is only put forward on a suggestion, in the absence of any information as to the practice.

Finally there is the jurisdiction given to the British Consul

* There is a Convention between Great Britain and Portugal for the mutual apprehension of deserters, dated 24 July, 1842. Provisions for carrying it into effect were made by 12 & 13 Vict. c. 96.

by s. 689 : a jurisdiction, it must be remembered, which is independent of convention.

The offences with which he has to deal are these referred to in s. 687 : first, all offences generally against person or property committed either afloat or ashore in any foreign port ; as before, this extends to offences by sailors 3 months after they have left a British ship : and secondly, all offences on the high seas by seamen on board British ships.

No jurisdiction is given to the Consul to try the case, but he is to take the necessary steps in aid of the British Court before which the case will be tried : first, to enquire into the facts upon oath—which is subject to the remarks already made : and secondly, he is to take any action in his power to place the offender under restraint, and to send him for safe custody for trial to the United Kingdom or a Colony. The necessary details as to the duty of masters of British ships to take the offender on board are settled by the sub-sections, and need not detain us. From what has been already said, the questions involved in these consular duties will be seen to be : whether, in the absence of a convention a Consul can exercise a jurisdiction over sailors, some of whom may be foreigners, in respect of offences, which, though they are offences against English law, may also be offences against the local law : even if this is so, whether the power can be extended to sailors who have left the ship and are therefore no longer under the protection of the flag : and, in both cases, whether he can deliberately withdraw the offenders, without extradition, from the jurisdiction of the local Courts.

It cannot be denied that the enquiry into what appears, on the face of it, a simple question, What is the position of a ship in a foreign habour ?— leads to no very conclusive answer. The absence of decision on the one side, with regard to foreign ships in British harbours : and on the other, the lack of any authoritative statement that the English law as to English ships in foreign harbours conforms to what is called the law of nations, leave many debateable questions unsettled, and it must be sufficient, in the absence of further guidance, merely to have indicated them. The statement of a concrete case showing the practical limitations of the application of the law of the flag, may not be without interest.

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Two Italian ships (both merchant vessels, or one a merchant ship and the other a man of war) are lying in an English harbour. A seaman deserts from the merchant ship. How far may the captain of the other vessel assist in his recapture? The answer would seem to be: if he is escaping in one of the ship's boats he may be lawfully recaptured without the intervention of the local authorities, for he is still within the sphere of the jurisdiction of his flag; and what is true of one ship must also be true of two or more ships and their boats under the same flag. If, however, he is swimming on shore his capture would fall within the province of the Consul, with the assistance of the local authorities. But if he committed an offence while swimming on shore, it would be for the local authorities to deal with him. The conditions might however be again varied if the sailor were escaping after having committed a crime on board.

Territorial waters.

The foregoing principles have to be applied to territorial waters in accordance with the principles already established in respect of them. As these waters are still high seas, the law of the flag will obtain until it is excluded by the application of the national law to this area.

SHIPS DRIVEN INTO PORT THROUGH STRESS OF WEATHER.

It has been said, on the authority of Law Officers of both England and the United States, that there is a further exception to the local jurisdiction, when foreign ships are driven into port through stress of weather. The question however needs some examination.

[Forsyth's "Cases in Constitutional Law", p. 399.]

In the case of the "*Industria*", a Spanish schooner which had put into a port in Jamaica in distress with five slaves on board, the Law Officers reported that "she could not be deemed to have thereby committed any offence against the laws of Great Britain", and that therefore "she was not liable to seizure and confiscation by the civil authorities of the Island." She might however, they continued, have been seized by a British cruizer under the slave-trade treaty with Spain, and carried before a Court of Mixed Commission for adjudication.

[*ib* p. 400.]

The "*Creole*" was an American ship, which put into port at the Bahamas with slaves on board, and the question was this time examined by the Attorney General of the country to which the ship belonged.

The opinion given was to the following effect :—

The principle is that if a vessel be driven by stress of weather, or forced by *vis major*, or, in short, be compelled by any overruling necessity, to take refuge in the ports of another, she is not considered as subject to the municipal law of that other, so far as concerns any penalty, prohibition, tax or incapacity that would otherwise be incurred by entering the ports : provided she do nothing further to violate the municipal laws during her stay. The comity of nations.....has gone very far on this point..... When a ship is driven into port by stress of weather, and there unloads her cargo, she is not bound to pay duties or customs in that place, because she came there by force : nor is she liable to forfeiture : neither are duties to be paid on goods forcibly driven into port ".

This opinion was based on the territoriality of merchant ships :—

" Beyond all question, a ship on the high seas, beyond a marine league from shore is part of the territory of the nation to which she belongs. Why should her being blown &c. within a marine league, by tempests, &c. make a difference ? "

With deference, too wide a doctrine seems to be here laid down. Undoubtedly, if, by the manner of her coming, the ship had neglected to observe some formalities required by the law of the port—as non-observance of quarantine regulations—stress of weather would be a good defence. But exemption to local laws, more especially revenue laws, requires, it is suggested, express legislation. There does not seem to be any such exemption in the English Customs Acts : and an example of express legislation in opposite sense is to be found in the law of Mauritius, which expressly enacts that—

[Ordinance No. 38 of 1888, art. 37.]

" all wreck, being foreign goods brought or coming into the Colony, shall be subject to the same duties as if the same were imported into the Colony. "

THE PROTECTION OF THE FLAG AT SEA.

The "protection of the flag", and the "freedom of the sea".

But although merchant ships are not, so far as their own nationals are concerned, part of the territory : and although the doctrine of the " territoriality of merchant ships " will not, as *Historicus* showed, bear a moment's analysis in time of war : yet, in time of peace, a general recognition of their nationality is accorded to them, which goes far to support the popular notion that, so far as other countries are concerned, merchant ships are part of the territory of their flag. The " protection of the flag " is

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the expression used to symbolise the right of ships and those on board, to pass unmolested on the high seas.

It would serve no useful purpose to search for some term which should connote with accuracy the status of merchant ships upon the high sea: "private property protected by the flag" is perhaps nearest to the mark. For, except as to actions *in rem*, the cause of which is treated as if it were an act of the ship itself, the main difficulty turns on the question how to reach persons on board ship: how far they are sheltered by the flag which protects the property on which they are: how far the "freedom of the sea" may be claimed by the individual, as distinct from the nation which claims that freedom for its ships.

But there are exceptions even to the freedom of the sea.

Piracy.

No nation claims to protect its subjects who are engaged in piracy. It is the great offence against the law of nations itself, in redressing which all nations take their part. The law is graphically summarized by an epithet and an aphorism: Pirates are *hostes humani generis*: against them there is no peace. Seizure and all the indignities of the sea are allowed: and the law, with extreme severity, holds justified visitation on suspicion of piracy, even though the innocent purpose be thereupon demonstrated.

Slave-trade offences.

Slave trade offences do not rank with piracy. They are dealt with by statute, and recognition of the statute is secured by convention. But trading in slaves is not an offence, nor indeed is there any other than piracy, against the law of nations, and seizure or search of a vessel carrying slaves can only be justified under convention. (*the Le Louis.*)

[Dodson's Admiralty, 210.]

The protection of the flag is a curious branch of the law of the high sea, which has led some nations into strange and somewhat illogical discussions.

Into the many cases in which the "protection of the flag", and its antithesis the "the right of search", have been discussed I do not propose to enter, for they would lead us too far from the main question under consideration: and they have been long and much discussed by writers on international law.

There is however one question which immediately suggests itself. How far can the freedom of the sea be used to turn ships into asylums of refuge from the consequences of offences committed on shore? How far may the flag be used to protect the

individual, by denying a right of entry on board to the executive officers of the country where the offence was committed? And on the other side: How far may a country take measures to protect itself against an abuse of the privileges of the sea? The question is simplified to a certain extent by the law of extradition in the case of ordinary offenders. For, whether a ship be absolute territory or not, there can be little doubt that extradition could not be refused of an offender whose safety from arrest depended on the protection which the flag afforded him. The process might perhaps be somewhat cumbersome, but would probably be ultimately successful. The circumstances of the different cases would vary considerably, and some become complicated by other principles: as where the vessel carried the refugee into harbour in a third country. The nature of the question raised must however be borne in mind: it is extradition as from the ship, and not as from the country at which the ship has touched.

Extradition from on ship-board

But there is for some cases another very effective remedy; the State whose laws have been broken, is allowed to put the matter into the hands of its own officers, and so to compel obedience, or to enforce punishment. This remedy is generally known as the right of "hot pursuit".

THE LAW OF HOT PURSUIT.

The law of the freedom of the sea, as it has been stated many times over by Statesmen and Judges, is this:— "The right of visitation and search is a belligerent right, and no nation which is not engaged in hostilities can have any pretence to exercise it upon the open sea. Any visitation, molestation, or detention of vessels bearing the flag of a friendly State by force, or by the exhibition of force, is in derogation of the sovereignty of that State." All these things the right of hot pursuit claims on behalf of the pursuing State.

Stated broadly, the principle is that when an offence has been committed within the jurisdiction, by a foreign as well as a British ship, and she gets away to sea, she may be pursued on the high sea, captured, and brought in to be dealt with according to law. We have here a direct exercise of force—usually by the Executive independent of any legislative warrant, though the principle may be embodied in legislation—upon the high sea. The condition is that the pursuit should be started immediately, that it should be

Elements of the law of "hot pursuit."

" hot pursuit : " but this condition being satisfied, there appears to be no limit of space or time during which it may continue. The pursuit may be continued the high seas over, but presumably stopping when the escaping vessel enters the area over which a foreign nation exercises its legislative jurisdiction.

But why is this " hot pursuit " justified ? Why does is not violate the freedom of the sea ? The answer must be found in the nature of the offence. And for this reason : it is certain that the law, confined as it is to a purely territorial operation, may in ordinary cases be evaded by escape to a foreign country. It is certain too, that if an offender, though taken red-handed, escape on board a foreign ship, he cannot be pursued beyond low-water mark, however hotly : the remedy, as indicated above, then lies in extradition. But the case can hardly be the same where the ship participates actively in the rescue. The difference then, if hot pursuit of ships is justified, must lie in the nature of the offence committed.

The two familiar examples of the application of the principle are offences against the revenue laws, or against the fishery laws, committed within the revenue or the fishery waters respectively. In these cases there is authority both in practice and judicial opinion, that hot pursuit outside those areas on to the high sea would be justified, and the seizure upheld as consistent with the law of nations. (Story, J. *the Mariana Flora*).

Offences against revenue and fishery laws.

[11 Wheaton's Rep. 37.]

Apart from the questions which the delimitation of these respective areas involves, these two cases, as it were, speak for themselves, and seem to indicate the essential features of the principle.

From the nature of the offences the ship would be used by the master for the commission of the offence, and pursuit and seizure are probably justified where the penalty is confiscation of the ship. For this an analogy is to be found (though indeed it may be no more than fanciful), in the case of hot pursuit of wild animals. The temporary property which is recognised in wild animals which have been confined is maintained during escape, if they are immediately pursued beyond the preserve. And it may be that where an offence has been committed for which the penalty is confiscation, the law regards the property of the State in the ship as having been so far created, that it may be preserved by immediate pursuit beyond the jurisdiction.

The details on which the principle is worked out require examination. First, who may pursue? Nothing is more certain than that the concession in favour of the aggrieved State does not include seizure on suspicion, even though the suspicion that the ship has offended be justified by the seizure and subsequent search. Except in the case of piracy, in which all States are assumed to be aggrieved, such a seizure violates the fundamental principle on which the freedom of the sea rests. We have therefore the first and essential element of "hot pursuit": certainty that the offence has been committed. But from this it might with some reason be contended, that the pursuit should only be conducted by one who has actually seen the offence committed. Such a strict reading of the rule would deprive it of half its benefit; and the better opinion seems to be that the pursuit may be undertaken by a vessel whose captain has received precise and reliable information on which he can act with certainty. Nevertheless he must start on the pursuit as immediately as it is possible on receipt of the information: for what is allowed is not "pursuit" merely, but "hot pursuit".

Who may pursue.

When pursuit to be begun.

The difficulties which must inevitably arise in testing whether the conditions have been satisfied by any particular seizure are obviously very great, and may be illustrated by two concrete cases. A cruizer receives information from the coast-guard of a distant station that a foreign ship has been seen raiding some seal rookeries, and a description of the vessel is given so that the cruizer can act with certainty. The seizure, even if the ship got away on to the high sea, would probably be justified. But suppose that the information was vague and indefinite, as that "some foreign vessels had been raiding", and no precise description of them was given: it is impossible to contend that a seizure on the high sea of a vessel pursued at random, on the off-chance that she was one of the raiders, would be supported; even though tangible evidences of participation in the raid were found on board.

Unless the principle, which contains in itself no limit of space or time, is strictly hedged in as here suggested—as to the nature of the offence, the time within which, and the person by whom, the pursuit may be undertaken—the result would be a claim of an almost unlimited jurisdiction over foreign ships on the high sea for territorial offences; a claim which, it is cardinal to the prin-

ciple to concede, would be wholly unwarranted. But not only this : from its nature the principle admits the rule that under ordinary circumstances no such jurisdiction exists at all : its claim to recognition is based exclusively on the fact that the circumstances are extraordinary, and demand an extraordinary remedy.

Yet once the principle is admitted, it cannot be limited to revenue and fishery laws : its existence as a legal principle must depend on the possibility of its application to all cases in which the fundamental conditions are satisfied.

Rescue of prisoners.

Concrete examples of the principle in action are naturally of rare occurrence : but the case already hinted at, of a ship participating in the rescue of prisoners may be taken as illustrating the extreme limits of its application. We may imagine a foreign ship landing part of her crew for the purpose of effecting the rescue of some political prisoners. If, as a matter of fact, they are rescued and taken on board, there can be little doubt that pursuit on to the high seas would be justified, and that if the necessity arose the ship might be fired into. Such a case seems abundantly covered by the principle of hot pursuit.

The difference between this and the breach of revenue or fishery laws is that there is no seizure provided for by law, and therefore the pursuit cannot end in confiscation. The case indicates some details which are important. It is suggested that the pursuing ship may take all such measures as are necessary to make the pursuit effective : such as, firing across the bows, and afterwards into the ship if she is not hove to, and seizure if it is found necessary to bring her into port. But it would seem to follow that the duration of the seizure cannot be longer than is necessary to attain the object of pursuit.

It is doubtful, if the ship were hove to and the prisoners handed over, whether anything more could be done to the ship, unless, in effecting the rescue, she had committed some breach of the laws, such as going to sea without her clearance. The case, not being based on a breach of any specific law, carries the principle into delicate ground, more especially as regards details. It seems fairly clear, however, that while on the one hand, there is no law to appeal to, and therefore no action possible before the Courts if the ship is brought into harbour, yet, once the pursuit is justified, everything else must be justified which is necessary to

make it effective, even to the extent of bringing her into harbour if the captain declines to deliver up the prisoners. But the prisoners recaptured, her offence would be at an end, and, no process being possible, there does not seem to be any further ground on which she could be detained.

It does not seem necessary to elaborate the obvious distinction between the case of rescue, and the ordinary case already discussed where a prisoner escapes on board a vessel proceeding to sea.

Leaving port without papers.

The above illustration suggests another case of actual breach of the law where pursuit on to the high sea would probably be justified. Leaving any question of rescue on one side, suppose a ship goes to sea without her clearance, and so, as it were is a participator in the offence of the master. The breach of the law *per se* is not serious, and the consequences usually fall on the ship at her next port of call.

A penalty is however generally provided in the Customs laws, but which is enforceable only when the ship comes again to the port. But it may well happen that a master may deliberately break the law, going to sea in order to evade the necessary formalities of the port. And it may be too that the Executive has sufficient reasons for treating the offence as serious, and for taking all measures to enforce the law.

Obviously the case is not one in which this extreme remedy would often be resorted to: but a case may be imagined, in which it might be essential to the safety of the State that this latent power should be resorted to. Thus, if there were hostile tension between two States, and there were reason to suppose that the evasion was deliberately planned with the connivance of the Government of the State to which the ship belonged, in order to secure some important documents. Pursuit on to the high sea and seizure would be the only effective remedy, and it is suggested would stand justified. Apart from the recovery of the documents, the procedure in the Courts would be only to enforce the penalties imposed by the Customs laws, so long as the tension had not developed into actual war.

The principle of hot pursuit applies as well to breaches of the law in force in the territorial waters as to offences committed in harbour or in the waters of the dominion. It has in fact a very special application to the territorial waters, for it fills one of the

gaps left in the protection of the national rights by the fact that these waters are not part of the realm. Breaches of revenue and fishery laws are more often than not committed in shore by small boats, the ship herself lying off in the territorial waters. In such a case, the seizure of the ship would undoubtedly be justified on the ground that the boats are the dependencies of ship, and that therefore she is herself constructively guilty of having committed the offence.

Offences by small boats, the ship lying off superintending.

The territorial waters have been specially referred to, as the question has a practical bearing on what may be called the legal status of these waters. But the rule here suggested is obviously not limited to them ; the ship's boats may themselves be operating in territorial waters, and the ship lying some miles out to sea.

There seems, however, to be one manifest condition attached to such a seizure : that there should be some overt act of the ship in relation to the offence, showing her participation in it : thus, that she was superintending the operations of her boats, and was, in fact, their base or *point d'appui.*

Active participation in the offence is probably the essential to seizure, and not the mere fact that the boats belong to the ship. Suppose, for example, boats belonging to a vessel had been seized for sealing in dominion waters, the ship herself being at the time twenty miles away fishing on her own account. The seizure of the ship by a cruizer, in consequence of information by telegraph that her boats had been captured, could scarcely be justified. This brings us back to the simple case with which we started. The case is in fact a corollary of what has gone before. Certain conditions being fulfilled in regard to her relation to her boats, a vessel not actually in the waters is regarded as constructively within those limits : then the law as to seizure of vessels for offences committed within those limits must apply : that is to say, she may be seized at once, or she may be pursued on to the high sea.

THE HOVERING ACTS.

The Customs law deals with an offence known as "hovering at sea".

Protective legislation against breach of Customs Law.

The legislation is of a very peculiar nature, being essentially preventive and protective. The law endeavours to prevent the commission of the offence of smuggling by chase on to the high

sea, and seizure if a vessel does not allow itself to be searched. This question is intimately connected with the subject in hand, for here too, as in the case of the fishing boats last considered, the direct issues are raised—How far may the high sea be made the base from which breaches of the municipal law of any State can be operated? How far will the freedom of the sea cover these operations with impunity?

Chase and seizure.

The principle of chase and seizure sanctioned by the Hovering Acts† is in reality the common law principle of hot pursuit in legislative form.

39 & 40 Vict. c. 36 ss. 179–181. [set out in Appendix to this Chapter]

The sections of the Customs Laws Consolidation Act, 1876, dealing with the subject are briefly the following—

s. 179, which provides for the forfeiture of vessels arriving within the United Kingdom or a certain distance thereof, having prohibited goods on board or attached thereto: for penalties if the goods are destroyed, and on the persons on board.

s. 180, which requires certain vessels to heave to on signal: for chase, and forfeiture of the ship if goods are thrown overboard.

s. 181, which allows ships liable to seizure or examination not bringing to when required, to be fired into.

These sections require very careful dissection to arrive at their true meaning, and to appreciate the nature of the jurisdiction which is assumed by them at sea. Certain minor details in which no fundamental principle is involved may be omitted.

"Hovering" at sea.

The offence of "hovering" in its old form, as defined by the Act of 1736, 9 Geo. II, c. 35, s. 23, was committed by a vessel lying off within four leagues of the coast, and there transhipping foreign goods into smaller boats, by which they were smuggled on shore. The modern definition of the offence in s. 179, casts its net with less particularity of detail: no overt act is necessary, the offence is completed by the mere fact of the ship arriving within the kingdom, or within a certain distance from the coast, having prohibited goods on board or attached thereto, or being fitted with smuggling contrivances.

This distance is declared to be three leagues in the case of ships "belonging wholly or in part to British subjects", and one

†I have retained the old expression "Hovering Acts" for the modern provisions of the Customs laws, as they are in direct descent from the old Act 9 Geo. II, c. 35, which dealt with the offence then called "hovering". The offence of to-day does not differ in principle from that created by the earlier legislation, for it could not be committed without the preliminary hovering at sea.

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Jurisdiction over ships. *cf.* Part I, p. 169.]

league in the case of ships " not British ". The reference to part-ownership of ships by British subjects is not clear ; for, by s. 1 of the Merchant Shipping Act, a ship which belongs in part to British subjects, is not a British ship,† and it would therefore come within the description "not British". It is probably intended to include ships where the owners have evaded the Merchant Shipping Act, or which are nondescript as to their flag‡; or, it may apply to ships of a country, if such there be, which does not insist on its merchant vessels being owned exclusively by subjects.

The offence may also be committed by ships having "half the persons on board subjects of His Majesty", within three leagues of the coast. This raises another difficulty ; for the nationality of the persons on board ship has nothing, either in law or practice, to do with the nationality of the ship ; and the effect of this provision is that the 3-league jurisdiction must in some cases extend to foreign ships. A corresponding provision in the law of another country might often apply to a British ship, many of our ships being manned in great measure by foreign sailors, unless the nationalities were so mixed that the larger part of the crew did not belong to the same country. This provision also differs in principle from the criminal jurisdiction under the Merchant Shipping Act* : there, the nationality of the sailor is merged in the nationality of the flag. But all " persons on board " are not necessarily sailors : and smugglers are often long-shore men.

*[by s. 686 *cf.* p. 28.]

The second part of the section deals with throwing overboard or destroying contraband goods to prevent seizure. The penalty is forfeiture, but the nationality of the vessels is not regarded, the protective area being three leagues in all cases.

Jurisdiction over persons.

In the third part the personal jurisdiction is introduced. British subjects are made liable to a fine for being or having been on board ships liable to forfeiture within three leagues, and foreigners on ships within one league, from the coast. It would appear that the penalty might extend to British subjects on foreign ships within the three leagues, but it would not extend to foreigners either on British or foreign ships within the same distance.

The definitions of the different offences apply both to the

† And by s. 69, such a vessel would be liable to forfeiture if the British flag is used " for the purpose of making the ship appear to be a British ship ".

36 & 37 Vict. c. 59.

‡ Nondescript ships are [also] specially dealt with in connection with slave-trade offences : *see* East African Courts Act, 1873, s. 3.

present and to the past. Thus, the section first deals with ships found within, and ships discovered to have been within, the prohibited area. So, as to the prohibited goods: the offence is constituted as well by "having had" as by "having" them on board: so, as to throwing such goods overboard, or staving them to prevent seizure, the form used is "shall be or have been", also with regard to ships found within, or discovered to have been within, the area: and finally, as to persons, those are liable who are found on board, or discovered to have been on board, a vessel liable to forfeiture within the prohibited area.

Evidence of the offence.

The evidence required to establish the offence, in the absence of direct proof of the goods being or having been on board, depends on the construction of the vessel: the presence of false bulkheads, false bows, double sides or bottom: of devices for running goods, and contrivances for attaching goods or casks in the water to the ship, and of appliances for sinking them to avoid seizure. The offence of hovering is thus established by evidence, which can leave no doubt that the actual offence of smuggling has been, is in process of being, or is intended to be, committed.

Lastly, as to the penalty: the ship and all contraband goods and all smuggling appliances are forfeited, and the persons on board are liable to a fine of not more than £100.

Modifications of law of 1886.

50 & 51 Vict. c. 7.

53 & 54 Vict. c. 56.

The extreme severity of these provisions has been somewhat modified. In 1887, the liability of any person to conviction was made to depend on the existence of "reasonable cause to believe that [the] person was concerned in, or privy to, the illegal act or thing proved to have been committed". And in 1890, the liability of the ship to forfeiture was restricted to vessels under 250 tons burden. With regard to vessels of 250 tons or upwards, the Commissioners of Customs, subject to appeal to the Commissioners of the Treasury, were given power to impose a fine not exceeding £50, "in any case where in their opinion 'a responsible officer' [as defined by s. 3] is implicated either actually or by neglect": with power, however, if they consider £50 not to be an adequate penalty, to proceed before the Justices for condemnation of the ship in a sum not exceeding £500. By s. 4, however, the law with regard to forfeiture of goods and punishment of persons is maintained in the case of all ships irrespective of tonnage.

In s. 180 we come to a new order of ideas: the right is given

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to His Majesty's ships to signal to other vessels to bring to, the intention being to exercise the right of search on suspicion. The special offence dealt with by this section is the throwing overboard any part of the lading, or staving, or destroying any part to prevent seizure, before the ship is brought to or during chase. The penalty is forfeiture of the ship.

Right to search.

The points to be specially noticed in this section are—

a. that it corresponds with s. 179 in respect of two classes of ships only ; the signal to heave to may be made—(*i*), to ships owned " wholly or in part " by British subjects : and (*ii*), to ships having half the persons on board British subjects. The section does not apply in express terms either to British, or to " not British " ships : but, although the jurisdiction is apparently based on the British nationality of the owners, yet it is not a personal jurisdiction, and foreign ships might be forfeited under it :

b. that chase of a ship not bringing to is sanctioned, special offences being created during the chase :

c. that persons escaping during chase are to be deemed British subjects until the contrary is proved and :

d. that there is no defined area of the high sea within which the signal to heave to may be made, or must be complied with, and, consequently, within which the chase is confined.

Ship not heaving to may be fired into.

By s. 181, a penalty of £20 is imposed on the master of a ship " liable to seizure or examination ", not bringing to when " the proper pendant and ensign " are hoisted on the pursuing vessel ; and further, the vessel chased may be fired into after a signal gun has been first fired. How far this may apply to foreign ships has been indicated above.

[*see* Appendix to this Chapter.]

Three other extra-territorial sections of the Customs Act must be noticed.

By s. 134, officers of Customs may board any ship after clearance outwards, within any port, or within one league from the coast, and demand her clearance ; a special penalty being provided by s. 136, if the officer is carried off to sea.

By s. 200, picking up spirits in casks of less than 20 gallons floating upon or sunk in the sea is prohibited. The section follows naturally on to the smuggling sections, and contemplates the smuggler's ingenious contrivance of dropping casks of spirits overboard, or sinking them, to be afterwards innocently pick-

ed up by the shore men.‡ "The sea" is referred to, and this probably means the high sea. But in spite of the wide scope of the previous sections, it is not clear whether "any person" in this section would be interpreted according to the strict rules of jurisdiction, or would fall within the principles to be now considered.

The question of jurisdiction in the case of offences committed "upon water not being within any county", is dealt with by s. 229, which provides that they are to be deemed to be offences committed upon the high sea. Offences in the dominion waters are therefore, treated as being committed within the county: and where there is any doubt on the question, the offence is to be treated as having been committed on the high seas. The possibility of such doubts arising has already been fully explained. [*see* Part I, p. 14 · the case of the Bristol Channel.]

It will be well now to summarize the conditions under which the British Government assumes jurisdiction for the protection of its Customs revenue. There are many difficulties of interpretation, other than those which arise in connection with the ownership of British ships: such, for example, as that resulting from colonial naturalization, persons naturalized in the Colonies not being British subjects even on board British ships. These, however, may be left aside: the important point to determine is, whether the jurisdiction which is in fact claimed, conforms to or departs from general principles.

A.—*As to the offence by the ship of "being or having been" within the prohibited area under the conditions specified in s. 179.* Summary of principles of law as to hovering.

i. Jurisdiction is claimed over ships which are "not British": ships which may, therefore, be either nondescript or foreign. The intention *apparently* manifest is to limit the exercise of this jurisdiction to one league from the coast for foreign ships, and three leagues for British ships. But jurisdiction is in fact claimed over foreign ships within three leagues, unless the definition of British ship given by the Merchant Shipping Act which was the definition in force prior to 1876 is to go by the board, or the apparent intention of the section is to be abandoned.

ii. Jurisdiction is claimed over ships, not in respect of their nationality, but in respect of the British nationality of half the persons on board. The seizure and forfeiture of the ship in this

‡The limitations of the provision show that it is not introduced in order to protect the droits of Admiralty.

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case is expressly provided for : the right to seize is, therefore, not asserted merely for the purpose of establishing jurisdiction, and subsequently enforcing the penalties, against the persons on board. It would, however, establish practically the jurisdiction over the persons on board, some of whom may not be British subjects. This jurisdiction is governed by rule *iv.*

B.—*As to offences actually committed within the prohibited area by persons on board the ship.*

iii. Jurisdiction is claimed over the ship irrespective of the nationality of the ship or of the persons on board, if within three leagues the evidences of an attempt to evade the Customs law are deliberately destroyed.

C.—*As to the offence by persons of "being or having been" on board the ship within the prohibited area, under the conditions specified in s. 179.*

Examination of the personal jurisdiction.

iv. Jurisdiction is claimed over the persons on board ship in a manner which does not correspond with the jurisdiction which is claimed over the ship. Irrespective of the nationality of the ship : irrespective of the question whether jurisdiction has been exercised over her, or even whether jurisdiction over her is claimed, the personal jurisdiction in respect of being on board, in other words, of being accessory to the offence of hovering, is claimed within three leagues for British subjects, and within one league for foreigners. It would appear as if the jurisdiction over foreigners on board British vessels is in this instance abandoned.

The result of this is, first : that it by no means follows, because the ship is seized and may be liable to forfeiture, that therefore all the persons on board will be liable to the personal penalties : a point not without its importance in the case of jurisdiction claimed over the ship in consequence of the British nationality of half the persons on board. Secondly, whatever may be said as to the jurisdiction over the ship, the jurisdiction over the person is brought into harmony with the ordinary rules of the Court. So far as the one league—the limit of the territorial waters established two years after the Customs Consolidation Act—for foreigners is concerned, there is however the further question, to be presently considered, whether the sanction of the Secretary of State is required before the prosecution is commenced.

[*see* Chapter V.]

It is manifest that in some matters this special jurisdiction exceeds the principles laid down with regard to extra-territorial

legislation : and that if the provisions of the Customs Act were subjected to the rule of " religious interpretation ", which some Judges have endeavoured to establish, some of them might be found not to be in accordance with the canonical rules of jurisdiction, and be interpreted in such a way as to defeat the manifest intention of the Act ; it matters little to determine in regard to what precise particulars this might happen. It is suggested that the argument based on jurisdictional rules would be altogether discarded by the Court, and the law enforced from a broader standpoint.

[see Chapter III.]

This form of legislation rests, as has already been hinted, not on the rule of jurisdiction, but on the principle of self-defence. By the light of this principle it is asserted that it is recognised by all nations, and by the law of nations.

Hovering legislation rests on principle of self-defence.

It cannot however be stated that opinions are unanimous on the subject of these Acts. The following divergent opinions may be collected from different authorities :—

Conflicting opinions.

i. That they have now become so universal that they are recognised by the law of nations.

ii. That they are sound in principle : being based on " the right of a State to take all necessary measures for the protection of its territory and rights, and the prevention of any breach of its revenue laws."

iii. That the jurisdiction is not *in invitum*, but from its nature is exercised only over trade in progress towards our shores.

iv. That they are unsound in principle, because the jurisdiction of a State is absolutely bounded by the territorial waters.

v. That though they are unsound, they are tolerated on account of the *mala fides* of the vessel implicated.

With regard to the first view, we have unfortunately not sufficient evidence that this form of legislation exists so universally as to warrant the statement that it has, for this reason, become part of the law of nations. The assertion is probable, but it has not, so far as I know, been supported by a comparative study of the laws of all nations.

The third view, that this jurisdiction is not *in invitum*—in other words, that it is a jurisdiction which, being only exercised in port it is optional to the ship to accept or not, is difficult to follow. Undoubtedly, trading to any given port is optional, and

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to this extent therefore the ship may be said to have a right to choose whether the jurisdiction shall be submitted to or not. But in the first place, the offence of hovering does not depend on coming to the port, but on lying outside; and in the second place, it needs some stretching of legal language to describe legislation affecting persons who have, or are assumed to have, the deliberate intention of smuggling, as different in principle from other legislation having for its object the punishment of more common offences.

The "toleration" view examined.

The fifth, or "toleration" view, though it has the support of many very eminent lawyers, is in truth no principle at all, and is treated confessedly as a question of policy. It does not go the length of asserting that it is the duty of a State not to interfere to prevent, or protest against seizure, because its vessel has acted *mala fide*: it hardly even asserts that non-interference in such a cases is becoming customary: but only that it is a question of policy for one State not to interfere where one of its vessels has been seized for an offence by a friendly State. But this surely is too uncertain a ground on which to rest such important legislation: for if that legislation is in fact unsound, the seizing State has no answer, even if the vessel is seized in the act, if its Government chooses to abandon this policy and to protest. And even the term "friendly State" does not smooth away the difficulties for, in the very endeavour to enforce her views as to this peculiar form of legislation, the seizing State may become a hostile State. Such acts indeed might lead to preparations for war: for the violation of the freedom of the sea has always been looked upon as a *casus belli*.

But even assuming that this legislation rested on no broader basis than that of a policy of non-interference, it is clear that the policy itself requires some limitation to its exercise. It is not seizure under *any* statutes which would be tacitly submitted to, but only under statutes which are reasonable in their nature and operation: or perhaps, which are analogous to those which are in force in the State to which the offending vessel belongs. But then, what would this policy of non-interference amount to? Practically to the recognition of the reasonableness and justice of a statute which is not otherwise valid by international law: to the toleration of the exercise of a jurisdiction over vessels on the high sea, but, at the same time, to the negation of the right to

exercise it. It would endow the foreign legislation with the strength which it does not possess inherently, and that without even the assurance of reciprocity.

It is essential, therefore, to enquire whether this form of legislation cannot be rested on a safer basis: whether it may not be justified by the law of nations. The second view, that this legislation is sound, is advocated by, among others, Cockburn C. J., Marshall C. J., and Sir W. Scott.

The soundness of this legislation examined.

The question is, whether a State may, for a particular purpose, create an area outside its territorial waters within which it may declare certain acts to be offences, even when committed by foreign vessels: such vessels being liable to chase on to the high seas and to seizure.

In this there is no question of toleration. It was the *right* of a State to take these measures of protection that Cockburn C. J. referred to in *R.* v. *Keyn*. It was the *right* recognised and submitted to by other nations that Marshall C.J. asserted in *Church* v. *Hubbart*. It was the *right* that Sir W. Scott emphasized in *the "Le Louis"*. Higher judicial authority to support a principle of international law could not be found.

[L. R. 2 Ex. D. at p. 214.]

[2 Cranch, 187.]

[2 Dodson, 249.]

Authorities supporting the jurisdiction.

But yet, for such weakness as it may introduce into the voice of authority, it is to be noted that two at least of these opinions are *obiter*. In *Church* v. *Hubbart*, an action on a policy of insurance, the question was whether the seizure fell within the excepted risk, which was against things prohibited by Portuguese law: and under this law, so well-known to both parties that it was practically *the* excepted risk, the vessel was seized. The discussion whether that law found a warrant in the law of nations was therefore beside the question. In like manner, the expression of an opinion on this point was not absolutely material to the question whether Ferdinand Keyn's negligence was triable by the English Courts. But *obiter dicta* are not necessarily bad law. The eminence of the Judge, the object with which he introduces his remarks, their bearing on the main issue, are points material to be considered. And here the *dicta* were far from being casually irrelevant. The first was in a considered judgment of much learning: the second in one of the most elaborate and masterly reviews of a whole subject that has ever been delivered from the English Bench. Sir Alexander Cockburn expressed doubt and uncertainty as to the actual existence of the 3-mile limit; but in

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striking contrast with this spirit of doubt, we find on this question of the Hovering Acts the spirit of conviction : we find the affirmation of the broad principle which had been enunciated many years previously, that Parliament has the *right* to pass them within the limits which the American Chief Justice attached to it, that both the distance from the shore, and the steps to be taken to enforce the law, should be reasonable : for on this reasonableness the acquiescence, as distinguished from the toleration, of other nations is dependent. Such an opinion, coming from such a source, it is impossible lightly to pass over.

The opposite view.

Against these very strong opinions there is no judicial authority at all ; but the contrary view is expressed by Mr. Dana in his note in Wheaton's Commentaries. His argument resolves itself into this, that the legislation is unsound because it applies beyond the territorial waters. He pins his faith entirely on the immutability of the 3-mile limit. But, as we have already seem, the 3-mile limit is far from being the standard : the " marine league " is not accepted in the law of nations as the universal measurement, even of the ordinary territorial waters.

To say that a Hovering Act is unsound in principle because it applies to an area outside the territorial waters of the State, is equivalent to saying that the limit of jurisdiction of a State seaward is the same for all purposes : which begs the question under discussion.

Conclusion : that the Hovering Acts are legitimate.

But it is not : and the conclusion that the territorial waters of a State must be recognised so long as the distance is reasonable, although the limit does not correspond with that of the State called on to recognise it, has been found to be based on fact as well as theory. On fact, because all nations are not agreed as to the necessity for a uniform limit : nor does any nation insist that the limit of another State must correspond with its own, which is the meaning of non-recognition. On theory, because, as it has already been said, what is sufficient for a nation with a limited coast line may well be insufficient for one whose coast is a great extent ; the restrictions which are inevitable where the territorial waters have to be withdrawn from a narrow, much-frequented sea, are not necessarily binding in less-frequented oceans. And so with regard to special laws which nations have found to require an extension seaward for self-defence, laws dealing with fisheries, revenue, and health, the same argument

[*per* Marshall C.J. *cit.* L. R. 2 Ex. D. at p. 215.]

must apply : what is sufficient for the protection of some interests may be insufficient for the protection of others : and the requirements of each law may themselves vary in different countries, and even in different localities in the same country. The British Behring Sea Commissioners in fact reported that three miles was insufficient to protect the Canadian seal fisheries. *Ex concessis,* three miles is insufficient to prevent smuggling.

I therefore submit that the Hovering Acts are sound in principle, and warranted by the law of nations, so long as the essential conditions are fulfilled, that the provisions of the law : and the distance to which they operate seaward, are reasonable.

Hot pursuit may reinforce the actual provisions of the Act.

But this test of reasonableness as to distance must be applied only to the Act itself in its definition of the offence of hovering. It does not preclude the application of the doctrine of " hot pursuit " in all its rigour, and beyond the limits created by the Act, when the offence has actually been committed.

The standpoint of municipal law cannot differ from the standpoint of international law.

It is submitted that legislation which is sound from one standpoint cannot be unsound from another : that what is held warranted by the law of nations, cannot be unwarranted by the law of England. If, therefore, the question were to come before an English Court whether a penalty imposed on a foreigner under one of the foregoing sections could be legally enforced, or whether a seizure of a foreign ship on the high sea was valid, it is suggested that the Court would not act on any narrow construction resulting from the rules of jurisdiction, but would adopt the broad construction resulting from the principle of self-defence.

But once the principle of self-defensive legislation is admitted, it follows that the principle cannot be limited to statutes for the protection of the revenue by prevention of smuggling, but must apply to all cases where necessity demands it. The authorities already quoted support the principle to this full extent. Thus, Sir W. Scott in *the* " *Le Louis* " referred to " fiscal and defensive regulations more immediately affecting safety and welfare". Cockburn C. J. referred to "the right of a State to take all necessary measures for the protection of its territory and rights, and the prevention of any breach of its revenue laws". Marshall

C. J. in *Church* v. *Hubbart*, expressly dealt with a statute for the protection of commerce.

THE QUARANTINE LAWS.

The law of quarantine affords another illustration of defensive legislation.

General aspect of the question raised by the quarantine law.

Looking at the question from a general point of view, it may be said that it is the fundamental idea of the law of quarantine to require certain things to be, and certain things not to be, done at a given distance from the shore by all vessels, national as well as foreign, coming to British ports. The penalty is enforceable on arrival in port.

In the fact that the Legislature commands something to be done on the high sea, and punishes disobedience to that command, there is an exercise of legislative authority on the high sea: though, in this case, the law does not sanction those active measures of punishment, chase on to the high sea and seizure, which it sanctions in the case of breaches of the Customs Act. And for this reason, that the offence against which the State desires to protect itself cannot be committed by mere hovering at sea, but only when the ship actually comes to port. Yet if, after the offence is committed, the ship should escape to sea, the law of hot pursuit would immediately become applicable, and she could be pursued and brought in, and the punishment provided by the Act enforced.

This, it is suggested, is a sounder way of stating the principle on which this legislation rests than the explanation given by some of the authorities—that practically it amounts to no more than a prohibition against entering port unless certain conditions are fulfilled; and that, although the performance of quarantine may be said to be one of the incidents of trading, yet it may be avoided, and therefore that this jurisdiction is, strictly speaking, *in invitum*. This view of the matter was taken by Dr Lushington in *the "Annapolis"*, and was quoted with approval by Sir Alexander Cockburn :—

[Lush. Adm. 295; *cit.* L. R. 2 Ex. D. at p. 220.]

"I am opinion that Parliament has a perfect right to say to foreign ships that they shall not without complying with British law, enter into British ports, and that if they do enter they shall be subject to penalties, unless they have previously complied with the requisitions ordained by the British Parliament; whether those requisitions be, as in former times, certificates of origin, or clearances of any description from a foreign

port, or clean bills of health, or the taking on board a pilot at any place in or out of British jurisdiction before entering British waters."

With deference, it seems better, if it can be justified, to put the quarantine law in the same category as the hovering law, rather than to rest it on this lower level. It is true that the practical aspect of the question is that executive and judicial action are limited to the shore, yet, the mandate extends to the sea, and in this it resembles extra-territorial legislation in its ordinary form. The question is whether this legislation is to be governed by the strict rules of jurisdiction, or whether the reason of the thing does not justify a departure from them. It is submitted that it is amply covered by the broad principle of self-defence.

Modern English view of quarantine.

We must now proceed to examine in greater detail the English law on the subject. It must first be noted that "quarantine" as an English legal expression has disappeared. The title of the Public Health Act of 1896 is, "to make further provision with respect to epidemic, endemic, and infectious diseases, and *to repeal* the Acts relating to quarantine". The elaborate provisions of the Act 6 Geo. IV, c. 78, have disappeared, and the question is now treated as a part of the legislation dealing with the public health, power being given to the Local Government Board to make regulations to prevent the introduction of disease by ships "coming foreign".

But since this law, which may be said to be the most scientific method of dealing with the question of quarantine, was only passed in 1896 (the Act of George IV indeed received the dignity of a "short title" in the same year), and since this method is far from being universally adopted, it is necessary for our present enquiry to examine the extra-territorial provisions of the old law as well as those of the new: more especially as it was in presence of the old statute that Cockburn C. J. approved the general principle; and that similar provisions may still be found in the laws of other countries

[Both the old and the new laws are set out in the Appendix to this Chapter.]

Examination of 6 Geo. IV, c. 78.

Taking the old law first in order, we find sections 7, 8, 9, and 10, applicable to ships on the high sea: the remainder of the Act dealing only with quarantine, *i. e.* with the duties laid upon masters of vessels, persons on board and others, on and after the arrival of the vessel in port.

The provisions of s. 7, which relate especially to vessels "within or without the Straits of Gibraltar," need not detain us.

The others need the same dissection as those relating to hovering at sea.

The old law of quarantine examined.

A duty is imposed by s. 8 on the master of a vessel "liable to the perfomance of quarantine" to hoist a signal at the main-top masthead by day and night, which varied according as the ship had a clean or foul bill of health. This signal was to be hoisted on meeting with any other vessel at sea, or when she herself was within two leagues of the coast, and was to be kept hoisted while the other vessel was in sight, or while she was within the two leagues from the coast.

By s. 9, another signal was required to be hoisted, and kept hoisted as before, when there was plague or infectious disease on board; and, as before, when meeting any other vessel at sea or while she was within the two leagues.

A penalty was imposed by s. 10, on any master hoisting such signals, knowing that the vessel was not liable to quarantine.

In the first place, these provisions apply as well to foreign as to English ships: and in so far as they applied within two leagues from the coast they did not differ, as regards reasonableness of distance, from the Hovering Act. But the duty of hoisting signals on meeting other ships at sea is drafted so vaguely in s. 8, that it might have extended all the seas over, unless a more restricted meaning can be given to the words "vessel liable to the performance of quarantine". If they were intended to refer to vessels coming from an infected port and "liable to the performance of quarantine" on arrival in port, there is no apparent limit to the area within which the duty was required to be performed; the liability to quarantine resulting from the fact that her destination was a British port. But if these words only meant that the signals were to be hoisted after the liability to perform quarantine had actually arisen, *i.e.*, after arrival in port, or at least within the waters of the realm, then the meeting "at sea" must have been used in a colloquial sense, and the area of the law's operation would have been two leagues. The difficulty of determining the area seaward to which the law applied arises from the fact that "within two leagues" and "at sea" are throughout used in the alternative. The Act throws no light on the question by means of a definition.

But s. 9 is still more difficult to construe. The definition of the ships to which the section applied is not, as in the previous

section, those " liable to the performance of quarantine ", but those " on board whereof the plague or other infections disease or distemper highly dangerous to the health of His Majesty's subjects shall actually be ". From the general terms in which the section is drafted, it would appear to apply to all vessels and to the whole sea. There are indications however, towards the end of the section, that it was intended, like the previous section, to apply only to ships coming to British ports.

On these difficult questions we have no authority to guide us, except the general principle laid down by Cockburn C.J., referred to above, that a State has a right " to take all necessary measures for the protection of its territory and rights ", irrespective altogether of the 3-mile limit. It may be, however, that should the question ever come to be fully argued in respect of similar provisions of foreign laws, that the Courts might find some more reasonable interpretation than that they applied during the whole of the ship's voyage to a British port: or, if that were the only possible interpretation, might apply the doctrine that the extent of jurisdiction claimed by a defensive law must be reasonable, and hold that such an extended jurisdiction was not a reasonable exercise of the right of self-defensive legislation.

Modern law for preventing introduction of contagious diseases.

I pass now to the modern law of quarantine, which is contained in the Public Health Acts of 1875, and 1896, and in certain regulations of 1896 made thereunder.

By ss. 130 and 134 of the Act of 1875, power was taken for the Local Government Board to make regulations for the prevention of the spread of epidemic, endemic, or infectious diseases, and to apply them to vessels within the territorial waters; and by the Act of 1896, further powers were taken for enforcing the regulations by Customs and Coast-guard officers, for signals to be hoisted by vessels with cases of disease on board, for the detention of such vessels, and prevention of persons landing.

[set out in Appendix to this Chapter.]

Three separate sets of regulations have been issued for England, Scotland, and Ireland respectively, in practically identical terms. The most important provision is that which requires a master of a vessel infected with cholera, yellow fever, or plague, to 'hoist " a large flag of yellow and black, borne quarterly "; when within 3 miles of the coast, no person being allowed to leave such ship after arrival until permission given.

This legislation is based on the following principles.

Principles of Public Health Act.

i. The regulations which may be made under s. 130 of the Act of 1875, are general sanitary regulations forming part of the municipal law. They are extended to the sea within three miles from the coast, *i.e.* to the territorial waters, as they were subsequently defined in 1878. There is no limitation as to the nationality of the vessels to which they may be applied. The question again arises, however, whether under the Act of 1878, the sanction of the Secretary of State is necessary to prosecution for offences. This will be discussed in a later chapter.

[*see* Chapter V.]

ii. By s. 134, special regulations are to be mabe when any part of England appears to be threatened, or is affected, by formidable disease. These regulations are expressly declared to be applicable to any vessels on the inland waters, or on arms or parts of the sea within the jurisdiction of the Admiral. The full meaning of this expression will be considered presently : for the present it is sufficient to say that the use of the words " arms or parts of the sea " would seem to point to the fact that the regulations are not intended to apply to ships upon the high sea, even to British ships.

[*see* Chapter III.]

iii. The Act of 1896 extends the power of the Local Government Board to make regulations to matters which formerly appertained to quarantine : among others, to the signals to be hoisted by vessels having disease on board.

39 & 40 Vict. c. 36 s. 234. [set out in Appendix to this Chapter.]

The law applicable to vessels arriving from infected ports is to be found in the Customs Consolidation Act, 1876 ; s. 234 of this Act provides that persons shall not land without permission from vessels coming from, or having touched at, any place where there is " reason to apprehend that yellow fever or other highly infectious distemper prevails ". The necessary orders are to be given by the Local Government Board† from time to time. The section also requires a signal to be, and remain, hoisted by such vessels until permission is given to haul it down.

Apart from this, one clause of the regulations contains all the law on the subject. It provides for the hoisting of signals by ships infected with cholera, yellow fever and plague, when within three miles from the coast ; persons being forbidden to leave the ship without permission.

†Formerly, by the Queen in Council. This amendment was made by 59 & 60 Vict. c. 19, s. 2.

This is in substance the quarantine law of the United Kingdom at the present day. In striking contrast with the old law the exercise of so much of the jurisdiction as is extra-territorial is strictly confined to three miles from the coast, but applies to foreign as well as to British ships.

The application of the modern law to the territorial waters.

The limitation of the sphere of operation of these provisions to three miles from the coast will lead almost inevitably to the suggestion that this legislation does not exceed the normal rules of jurisdiction, and therefore is not properly classed with the Hovering Acts.

[*see* Part I Chapter III, and Part II Chapter V.]

The law as to the territorial waters has already been touched upon, and will be dealt with more fully in a subsequent chapter, but it is necessary here both to repeat and to anticipate somewhat. The assumption of jurisdiction over the territorial waters by the Act of 1878 was specially limited to the criminal law. For all other matters the law remains precisely as it was at the time it was discussed by Cockburn C.J.: that is to say, that jurisdiction does not *exist* over these waters, but may be assumed and created by Parliament ; and that as to the distance seaward, there is no agreement as to how far it should extend, but it does in fact, and may in theory, extend to such a reasonable distance as Parliament considers necessary. Legislation which at the time extended seaward to three miles was treated by the Chief Justice as identical in principle with legislation which extended further, the justification for the one as for the other being the necessity arising in any given case for protection, and the right thereupon arising of passing protective laws. It is therefore submitted that in this respect also, the modern Public Health Acts resemble the Hovering Acts in principle, and stand justified by the same doctrine.

THE PRINCIPLE OF SELF-DEFENCE IN LAW.

This examination of the common law doctrine of pursuit and of the two statutes exhausts all the authority and illustration which the law of England furnishes us with of a most important doctrine.* But it is suggested that in them there is to be

* The first Hovering Act was the one already referred to, 9 Geo. II. c. 35 : and it will not be out of place to note the care with which the revenue was protected from this species of " wicked practice ". " Hovering on land " was dealt with as well as " hovering at sea " : s. 18 providing that persons " lurking, waiting or loitering within five miles from the sea-coast, or from any navigable river ", when there was reason

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Summary of rule as to self-defensive laws.

found sufficient justification for the following proposition :—A State has the right to take all necessary and reasonable measures for the protection of its territory and rights, and the prevention of any breach of its laws : that for ordinary purposes a zone of moderate width, in practice varying between three and six miles, is recognised as the reasonable and necessary limit in which such measures should be operative : but that for certain special purposes a wider limit is sanctioned—as for the protection of fishing : and for the protection of revenue and commerce, in which case a breadth of four leagues is not deemed to be unreasonable.

Further suggested limitation of the rule.

To this extent the law of peace trespasses on the law of war. In defence of its non-belligerent rights a State assumes to visit, molest, and detain, the offending ships of a friendly State. Such an assumption cannot but provoke adverse criticism ; but I think that there is sufficient authority for saying that this right has now passed within the scope of that recognition which lies at the root of the law of nations. In two of the hypothetical cases referred to, rescue of political prisoners and seizure of a vessel going to sea without her clearance, there are clements which might at any moment turn the case into the exercise of a belligerent and not of a peaceful right : but until that moment comes the right claimed must be judged from the point of view of peace, not war : and these cases have been examined from that point of view. The limits within which the law must operate to entitle it to recognition have been indicated : but a broader limiting principle may, it is submitted be laid down. A right claimed as a legal right, which is admittedly based on war-right, must be limited by the same fundamental principle as has been adopted by Statesmen

to suspect that they were intending to assist in running prohibited or uncustomed goods, were liable to be whipped and kept to hard labour for a period not exceeding one month.

By s. 22, when a ship coming from a foreign port with tea or spirits on board was found hovering within the limits of any port, or within two leagues from the shore, or having been within a port did not proceed on her voyage, wind and weather permitting, the cargo was forfeited. By s. 23, if foreign goods were taken in unduly, or put out of any vessel within four leagues of the coast, without payment of customs duty, they were forfeited, with treble value, and the vessels into which they were unshipped, if not exceeding 100 tons, were also forfeited.

From a historical point of view, the most interesting Hovering Act was 56 Geo. III, c. 23, passed in 1816 to prevent the escape of Napoleon from St. Helena. By s. 4 foreign vessels " hovering within eight leagues of the coast of St. Helena " were declared liable to forfeiture if they did not depart when ordered. This Act was the result of an understanding between the allied Powers, which was embodied in a Treaty by which the custody of their prisoner was entrusted to the British Government. The United States adhered to the arrangement in a Treaty of Commerce concluded with Great Britain at the same period.

when discussing action which might lead to war. That principle was laid down by Mr. Webster in the correspondence between the United States and Great Britain, in the case of *the "Caroline"*:—In order to justify a seizure in violation of the freedom of the sea, there must be "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation:—an act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it". This principle has ever since been accepted by Statesmen, Judges, and Jurists, as the only possible basis on which the seizure of ships in time of peace can be justified, and it may be taken as the test whether any principle of law which sanctions this extreme measure is permissible. The principles which have been suggested as governing the right of hot pursuit seem to conform to the letter to the rule laid down by Mr. Webster; the "overwhelming necessity of self-defence" is represented by the impossibility of otherwise obtaining retribution; for the absence of retribution in any given case inevitably leads to the commission of further offences; and in the case of legislation, the impossibility of otherwise preventing offences being committed. Whatever may be said of the somewhat vague provisions of the old quarantine law, I believe that the law of England falls well within this principle.

The right of self-defence from the point of view of diplomacy.

Beyond the limits as here laid down is the freedom of the sea.

"Upon the ocean in time of peace all possess an entire equality: it is the common highway of all, appropriated to the use of all: and no one can vindicate to himself a superior or exclusive prerogative thereof."—(Story J. *the Marianna Flora*). [11 Wheaton 37.]

But, if either England or any other country, should deliberately ignore this principle, should pass a law protecting an industry, which was not of such a nature as legitimately to demand it, by chase and capture upon the high sea: or an industry entitled to such protection, but should enforce the penalties at an unreasonable distance, or in an unreasonable manner, and should persist in its action, the remedy for the State whose ships are seized, and whose subjects are imprisoned, is perhaps diplomatic correspondence leading to financial compensation, but in the absence of this, is war.

The penalty for violation of the principles of self-defence is war.

THE LAW OF THE SEA.

But there is yet another question to be considered. Does it

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follow from what has been already said, that, save as we find it written in the common law and statutes of different nations, the law of the sea is lawlessness ?

It is important to determine how far acts committed on the high sea are governed by law. Since there is, as between individuals, no international law of right and wrong, it is clear that as in the case of specific legislation, so in the case of the law applicable generally on board ship, each nation must, and may, act on principles which are peculiar to it. The question therefore cannot be considered except by the light of some given system of law. The law of England does not entirely ignore the law of other countries, and it is probable that what I have termed " The Law of the Sea " is as complete under the English as under any other system of jurisprudence ; the question will therefore be considered simply as it is dealt with by the law of England.

Statutory protection of subjects incomplete.

So far as offences against person or property are concerned, statutory law is powerless to deal completely with the matter, as duties cannot be imposed on foreigners on board foreign ships : therefore protection of subjects at sea is of necessity incomplete.

Common law redress given by English Courts.

But the redress which the English Courts give is not limited to statutory remedies. In allowing actions to be brought for wrongs committed abroad, our Courts recognise the existence of rights and duties outside the law which it is their special province to administer. It is true that, in giving redress according to the maxim *locus regit actum*, they have attached a condition that the act should also be wrongful by English law ; but this does not alter the fact that our Courts do recognise the wrongfulness of acts committed outside the area of their territorial jurisdiction by a standard different from their own. How far can it be said that this principle is applicable to wrongs committed on the high sea ?

CIVIL REDRESS FOR TORTS COMMITTED AT SEA.

Case 1. Damage on board British ship, both parties being on board.

First, take the case of damage to person or property on a British ship on the high sea, both injurer and injured being on board. Quite apart from any special provision of the Merchant Shipping Act which might be applicable to the case, the whole of the common law applies on board British ships. The first and most elementary case is therefore completely provided for.

Secondly, take the case of damage to person or property on

a foreign ship on the high sea, both injurer and injured, as before, being on board. As the presumption is that foreign ships are, as British ships are, governed by the law of their flag‡—the extent to which it governs them being a question of evidence—the nature of the act would fall to be governed by that law. When a civil action is brought in the English Courts, the case will be determined in the same way as an ordinary case of tort committed out of the jurisdiction : the law of the flag will be first looked to in accordance with the maxim *locus regit actum*, and the English law will then be looked to in order to satisfy the rule that the act must also be wrongful by English law. The wrongfulness of the act being thus settled, an action will lie at the suit of either a British subject or a foreigner.

Case 2. Damage on board foreign ship, both parties being on board.

‡*cf.* p. 14.

There is of course, in both this and in all other cases, a condition precedent that the defendant be within the jurisdiction of the Court : or, if he be abroad, that he has been duly served with process according to the rules of service out of the jurisdiction, and the Court so seized with the action.

All the cases subject to procedure as to jurisdiction.

The causes of action on the high sea which most naturally occur to one's mind are wrongful acts, resulting in injury to person or property. But it is clear that neither the two elementary cases, nor the more complicated ones hereafter to be considered, can be limited to wrongful acts : the principle must be equally applicable to wrongful words. As to this, if authority were necessary, *Bree* v. *Marescaux* is a case in point, where a slander had been uttered on board a British merchant ship at sea, and an action held to be maintainable.

Redress includes wrongful words.

[L. R. 7 Q. B. D. 435.]

So far as to actions for wrongs, where both parties are on board the same ship. But complications commence when the parties are on board different ships, one British and the other foreign.

Cases where parties on board different ships.

It becomes necessary here to examine with great care the difficult question as to the place in which an act is properly said to be committed : in the instance, and putting the case broadly, on the ship where it actually takes place, or on the ship where the consequences ensue ?

Enquiry as to where an act is in law committed.

The question in its criminal aspect, arose for consideration in *the Franconia case*, though only some of the Judges discussed it.

" It becomes necessary to consider the second point raised by the Crown, namely, that though the negligence of which the accused was guilty occurred on board a foreign ship, yet the death having taken place on board a British ship, the offence was committed within the jurisdic-

[*per* Cockburn C. J. : L. R. 2 Ex. D. at p. 232.]

tion of a British Court of Justice. This is the point insisted on by my brothers Denman and Lindley, with the somewhat hesitating and reluctant assent of the Lord Chief Justice [Coleridge] of the Common Pleas. I find myself compelled to dissent altogether from their opinion."

I shall endeavour now to state concisely the whole argument of the Lord Chief Justice. Authority on the subject begins with *R.* v. *Coombe,* where a shot was fired from the shore at a person on a ship at sea and killed him. It was held that as the death took place on the sea, the offence was properly cognisable under an Admiralty commission. The case was distinguished from the old decisions, where the act of killing took place in one jurisdiction, and the death of the party killed in another, and where it was held before the question was dealt with by legislation,* that the offender was triable in neither, because in neither had the entire offence been committed. The distinction was based on the fact that the act causing the death was continuous through two jurisdictions. The idea of continuous action was then elaborated.

[1 Lea. Cr. C. 388.

Acts of continuing intention.

When a man blows out another's brains by putting a pistol to his head, the act takes effect immediately ; but where the shot is fired from a distance the blow is as much the act of him who fires the gun, as though it had taken effect immediately. In such a case—

[L. R. 2 Ex. D. at p. 234.]

" the act, in lieu of taking effect immediately, is a continuing act until the end has been effected, that is, till the missile has struck the blow, the intention of the party using it accompanying it throughout its course. The act must be taken to be the act of the party in the effects it was intended to produce, till its agency has become exhausted and its operation has ceased."

The person is thus tied, so to speak, to the consequences of his act, by reason of his intention that those consequences should happen. The intention accompanies the act into its ulterior consequences. If, therefore, the master of *the* " *Franconia* " had purposely run into *the* " *Strathclyde*", the Chief Justice would have been prepared to hold that the offence had been committed on board a British ship.

So far, therefore, Cockburn C.J. agreed with Denman J., that

* The whole question is considered irrespective of the provisions of 24 & 25 Vict. c. 100, s. 10, which provides for the trial of murder or manslaughter where the death occurs in England the hurt being on the sea or abroad, or where person is feloniously stricken in England and he dies on the sea or abroad. The examples of continuing acts considered later in the text are not specially provided for by the criminal law.

where there is a continuing act, a person, though not actually, may be constructively, on board the British ship where the consequences of his act ensue.

But it does not follow from this that therefore the person is withdrawn from the place where he pulled the trigger ; he was in fact there ; and whatever may result from his constructive presence on the ship where the bullet strikes the blow, that will not alter the fact, or the result, of his actual presence on the ship where he fired the shot. There was an American decision in the opposite sense, but the Chief Justice did not consider it necessary to examine the point. He added however—

" Whether the converse of the proposition will equally hold - whether it can equally be said that the continuing act is not done in the jurisdiction in which it originates, and in which the missile is set in motion—in other words, whether the case of *United States* v. *Davis* was rightly decided, is a different question, as to which I do not think it necessary now to express an opinion beyond saying that, should the question arise, it would be deserving of very serious consideration."

[L. R. 2 Ex D. at p. 234.]

[2 Sumner, 482.]

But the other Judges had applied the same principle to acts of negligence, and from this also the Chief Justice dissented.

Where there is no continuing intention in the act, where it is mere negligence, as the careless discharge of a gun, though it results in damage by wounding a person on board another ship, there is no intention as to the result which would, as in the former case, make the person firing constructively present at the place where the consequences ensue. The case is the simple one of an act to be judged by the law of the place where it was committed. It was this consideration which induced the Lord Chief Justice to hold that the master of *the "Franconia"* could not, in respect of his negligent navigation on that ship, be held to have been constructively present on *the "Strathclyde"*.

Acts of negligence : absence of continuing intention.

The question in such a case is, not whether the death was the act of the defendant in the British ship, but " whether the defendant, at the time the act was done, was himself within British jurisdiction ". From this point onwards the argument proceeds on familiar lines. The fact remains that the person who fires a shot which takes effect on another ship, is actually on board the ship from which he fired : for a foreigner to be liable to English law, he must when the offence was committed, have been on British territory or on a British ship : " protection and

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allegiance are correlative ; it is only where protection is afforded by the law that the obligation of allegiance to the law arises " : for which principle *Calvin's case* is the authority.

[Rul. Ca. II, 575.]

Summary of argument.

The result of this argument, is as follows:—If a shot is fired intentionally from a French ship which kills a person on an English ship, then, the act is committed on the English ship, and the person firing, whether a foreigner or a British subject, is criminally responsible. But unless the continuing act is also done in the jurisdiction in which it originates, if the shot were fired intentionally from an English ship killing a person on board a French ship, the criminal liability would only arise in the case of an Englishman, if the English law applied to subjects on board foreign ships, but could never arise in the case of a foreigner. But where the firing is negligent, then if it was on board an English ship the criminality of the act, whether committed by a British subject or a foreigner, will be judged by English law : if on board a foreign ship then even a British subject would only be guilty of an offence, if the act was criminal by English law, and if that law applied to subjects on foreign ships.

Distinctions between civil and criminal redress.

Distinctions drawn for the purposes of the criminal law must be equally applicable when the question is considered from the point of view of civil redress. There are, however, two important differences to be borne in mind between the civil and criminal aspect of the case. If the wrongdoer is neither actually. nor constructively, within British jurisdiction, the criminal law cannot be set in motion, but civil redress may still be obtained before the English Courts. Putting this in another way : so long as the person is within the operation of the criminal law, the Court will not concern itself with the question whether he is or is not amenable to another law. But in a civil action the double jurisdiction becomes a most important element. *Locus regit actum* requires the *locus* to be determined ; we must, therefore, ascertain what is the result of the double *locus* of a continuing act.

In civil actions *locus* must be definitely determined.

Case 3. Intentional injury on board French ship by person on British ship : or *vice versa.*

A British and a French ship are lying side by side on the high sea. X, on board the British ship, throws a stone through a porthole of the French ship and breaks a mirror belonging to Y, who brings an action against X in the English Courts.

Now, according to Denman J., who put an analogous case in his judgment, the wrongful act is committed only on board the French ship. But this is a case of continuing intention be-

tween the cause and its consequences, and it is difficult to see why the commencement of the act should be ignored, and account be taken only of the end: for it is continuous in intention from the beginning to the end.

Act committed in both ships, and must be tortious by both laws.

This can only mean that what happens is but one act from the beginning to the end. It seems impossible, therefore, to resist the conclusion that the act is committed in both ships, and that it must be judged accordingly: that is to say, it must be tortious both by French and English law. Conversely, the same result is arrived at if the position is reversed, X the tortfeasor being on board the French ship, and Y the owner of the broken mirror on board the British ship.

The case of an act which operates immediately makes this still clearer. If, for example, the mirror were broken by a stick thrust, instead of a stone thrown, through the porthole.

The result is practically the same as that of the English rule that the act in respect of which an action is brought must be tortious both by the law of the place where it was committed, and by English law. In either case the question still remains to be decided whether the act is in fact done on both ships or on one.

The result of the enquiry is most unsatisfactory and unconvencing, and, with much hesitation, I suggest that the whole question requires to be reconsidered.

General review of principle of "continued intention".

In the first place, the theory of constructive presence of the tortfeasor in the place where the consequences of the act ensue seems of more than questionable soundness. It takes its origin in the criminal side of the question as it affects foreigners, and lies at the root of the whole matter. But how is it possible for a foreigner who is not actually within the territory to be brought constructively within it? There is here no question of assumed jurisdiction as in the case of service on a foreigner out of the jurisdiction in civil matters, for that procedure is based on the fact that the defendant is abroad. Criminal law has no analogous procedure. The fundamental theory of the English criminal law in its application to foreigners, is that they owe obedience to the law because they are in fact within the area of that law's operation. Those familar lines into which the Chief Justice's argument ran when he contested the reasoning which would make negligent acts on board a foreign ship amenable to English cri-

[cf. p. 63.]

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minal law, applies with equal force to the case of intentional acts. The impression left on the mind, when reading this part of his judgment, is that the saving sentence‡ which excluded constructive presence from the application of the fundamental principles, is a parenthesis, as to the soundness of which he was not thoroughly convinced, in spite of his previous acceptance of the decision in *R.* v. *Coombe*. Is it possible for the same act—firing a gun—to produce such widely different results, according as it is fired with intention or by negligence ? that the intention should, without transferring the person's bodily presence from the ship on which he is in fact standing, create a fictitious presence on another ship ? But even this does not state the case fully : it is not the mere intention, but the fulfilled intention, of striking the other person with the bullet that creates the jurisdiction for the criminal law, of breaking the mirror with the stone that establishes the law for the civil action. If the person is not struck, nor the mirror broken, the jurisdiction does not arise, nor the law apply ; and yet the intention is the same in the case where it is not, as where it is, fulfilled.

[*cf.* p. 62.]

The doctrine of "continued intention" seems inapplicable to question of jurisdiction.

This brings as to the question which is vital to the argument. There is no difficulty in following the idea of continuous intention : the point is whether the result which has been attributed to the idea is sound. It seems to belong to another branch of the subject. The principle that a man is liable for the consequences of his act may or may not be affected by the fact that the consequences result in another country : by, for example, the law as to remoteness of damage not being the same in the two countries. Continuous intention, indeed, seems essentially part of the law of damage : it seems inappropriate to the purpose to which it has been put, the creation of jurisdiction. It is suggested that this inappropriateness is shown by the fact that the theory operates differently according as it is applied in criminal or civil cases. In the criminal law constructive presence at the place where the consequences ensue turns an act of firing committed on a foreign ship into an act committed in England : the result being that its criminal nature is judged by English law, and the possibility of the *locus* being also on board the foreign ship is discarded as irrelevant. But in the civil law an act of firing committed on an English ship is turned into an act committed abroad,

‡At the end of the argument ; see the middle of p. 237, L.R. 2 Ex. D.

with the result that the English Courts are compelled to apply the foreign law to it. To put the matter concisely, in the criminal law this theory affects the question of jurisdiction : in the civil law it affects the question of law.

From all points of view it is submitted that the sounder rule is, that for all purposes, whether of jurisdiction or of law, an act is committed where the action in fact takes place, the same law being applied to it whether it be committed with intention, or with negligence, or whether the intention is fulfilled or not.

Damage to be governed by law of place where it occurs.

The result of this argument is that the act and its consequences are severed, each being governed by the law specially applicable to it under the circumstances. It has already been suggested that that the law of damage in the foreign country may not be the same as that of England—as for example, on the question of remoteness of damage. It is suggested that we have here merely a question of acts committed, or resulting one from another, which must be governed by the law of the place where they are committed or result : and the artificial rule of the English Courts which applies to the tortious act itself, will find no application.

There can be no difficulty in treating the act and its consequences as separate in the case where they in fact occur simultaneously. It is merely the ultimate case, which is to be found in the application of all propositions, the interval of time separating the two gradually diminishing until at last it disappears.

Other questions involved in civil action.

Other questions suggest themselves : what of the application of the maxim *actio personalis moritur cum personâ?* and of Lord Campbell's Act ? It may be that the existence of the maxim in either country would prevent the action being brought. It may be also that in the absence of the maxim in the foreign country, persons suing in England might claim the benefit of the Act. Lastly, any question of mere procedure, such as those governing the rights of persons under disability to sue, would fall under the principle of the *lex fori*, and therefore be subject to the law of England.

This analysis of the principle underlying a question of double jurisdiction was inevitable. It would, however, serve no useful purpose to imagine a variety of cases which might occur when two ships are lying alongside : they are likely to be very varying, very novel, and often curious. But, as Willes J. remarked in *the Sub-*[15 C. B. N. S. 759.]

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marine Telegraph Co. v. *Dickson*, no weight should be attached to the mere novelty of a case : it is in all probability " a novelty of circumstance, not of principle ". And so with cases in this class, if imagination were given too free play the enquiry would still more become cumbered by the equally complex questions which arise in the law of torts. It is sufficient to establish the general principle, that subject to the principles applicable to the cause of action, an action will lie whether the injury be to person or property, and whether it be by word or deed.

General principle applicable to cases arising on board ship or on board different ships.

Collision cases.

Cases of collision at sea form no exception to this principle: for the " ancient maritime law " is but an adaptation of the common law to the circumstances of the sea : with the exception, however, that the Merchant Shipping Act covers the law of damages so far as British ships are concerned. So far as foreign ships are concerned, the general principles of the law of damages apply.

" A foreigner sued here for a collision at sea is liable for the full amount of the damage sustained ; whereas, a British owner would only be liable to the extent of the value of his own vessel." [Wills J., *citing the "Wild Rose"*].

[15 C. B. : N. S. at p. 775 :— Lush. Adm. 553.]

The difficulty arising from the fact that by law the navigation of ships on the high sea would be governed by different laws, and the law of damages by different principles, is overcome by the consent of all civilized nations to the " International Regulations for the Prevention of Collisions at Sea."

But cases may occur where the person or property injured is not on board ship, but in the sea itself. Thus, if a person on board ship were to hit a man over the head in the water with an oar: or were, by means of a noose, to steal a whale in the sea of which another had taken complete possession, as by lashing it to his boat : Would an action lie in respect of such acts in the English Courts ?

Case 4. Injury to person or property in the sea by person on board ship.

It would seem at first sight that the cases are only variations of those just examined, and that the principles already laid down necessarily apply to them. They do so in fact : but in applying them we come across another difficulty. If, for the purposes of the action, the law of the place where the consequences of a continuing act ensue is to be considered, then we have to ascertain what is the law of the sea—for the sea itself, and not a ship on the sea, is in this case the *locus*.

For the present purpose it matters little whether this is the law or not, for we may state the last case at once, and consider both at the same time. What will be the law applicable where both tortfeasor and the person injured are in the sea? Here again the *locus* is the sea. Thus it is impossible to dispense with the enquiry, What is the law of the sea? If there is no law, then we cannot evade, by such expressions as "nobody will deny",‡ the result that in this case no action will lie, and the law of the sea in this instance would be lawlessness.

Case 5. Injury to person or property in the sea by person also in the sea.

The application of English common law may probably be justified by one or other of two principles: either by analogy to the rule of settlement, the settlers carrying the law of England with them: or, by adopting Lindley J's reason for the application of the common law on board ship, that otherwise there would be no law at all. The rule deducible from either principle is, that the common law of England applies to British subjects whenever they are in a place which is governed by no other law applicable to them.*

Enquiry as to the law where the *locus* is the sea.

Cf. p. 12.

Whenever, therefore, the *locus* of any act is the sea, and the person whose act is in question is a British subject, the law applicable will be the English law.

There would probably be little difficulty in maintaining that this doctrine extends to foreigners under similar circumstances; for, unless I am mistaken, foreign countries assert more positively than England the persistence of the nationality of their subjects, and the personal application of their laws to them, wherever they may be. In an action in the English Courts this assertion would probably be given effect to.

Where one of the persons is a British subject and the other a foreigner, the fundamental principle of the application of the common law being the same in both cases, all questions would probably be decided in the same way as if the persons were on board ships of their respective nationalities.

One form of a well-known hypothetical case may also be

‡This, and similar expressions, were used in the case of damage to a submarine cable referred to in the text.

* It may not be immaterial to note in connection with this rule, that the Murders Abroad Act, 1817, which deals with crimes committed on desert islands, and the Acts 24 & 25 Vict. c. 31, 26 & 27 Vict. c. 35, 34 & 35 Vict. c. 8, and 37 & 38 Vict. c. 38, which deal with crimes committed on the unoccupied territory adjacent to Sierra Leone, the South African and West African Colonies, and the Straits Settlements, respectively, were passed merely to give jurisdiction to the Colonial Courts, and in no way depend on or affect the common law rule.

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noted as easy of solution without the usual disquisitions as to the application or operation of "natural law." The " law of the raft" would in all probability be held to be in direct derivation from the law of the ship whence the raft came, by extending, or rather applying the principle already discussed, that boats are dependencies of the ship, to planks which are part of the ship, or its cargo. Carrying hypothesis one step further, the "law of the raft" would also, in all probability, apply to a person who came adventitiously thereon, as by swimming from the wreck of a foreign ship.

Cases of wrongs done on a raft.

[*cf.* p. 40.]

Cases of damage to submarine cables.

The principles of law which we have been considering would, it is submitted, govern facts such as those which occurred in *the Submarine Telegraph Co.* v. *Dickson*, and in *the* " *Clara Killam* ". In both cases there was damage to a submarine cable : in the first, by the fouling of an anchor, the result of negligent navigation of a foreign ship : in the second, by deliberate act of the master of a British ship, who chopped the cable with an axe after his anchor had fouled it, though without negligence.

[15 C.B. : N.S. 759.]

[L.R. 3 A. & E. 161.]

[48 & 49 Vict. c. 49.]

The Submarine Telegraph Act 1885, was not in existence at the time : and the judgment of the Court in the first case was based on the following argument :—

" We may I think assume that it is lawful within certain limits to make use of the bottom as well as of the surface of the sea. As to the allegation that the defendants are foreigners and that they were at a distance from the shore, it is quite clear that our Courts have jurisdiction over causes of action arising on the high seas, and, had the cable been wilfully cut, no one could have disputed their power to try the offence : and it appeared that Mr. Archibald the counsel for the defendants did not set up the plea as an answer to the action " (Erle C. B.)

" If the injury complained of was sustained on the high sea the action can be maintained in this Court " (Willes J.)

It is submitted that the principle adopted was too wide for the case ; there seemed indeed some hesitation on the part of Sir Robert Phillimore in *the* " *Clara Killam* ", to adopt it, though his decision in the same sense laid down no other principle.

Case of property on the sea of which possession is temporarily lost.

We have here to deal with property on the high sea beyond the physical possession of its owner. The common law doctrine already examined is essentially personal, and could only apply where the owner was present in such a way as to assert possession—fundamental to the action in the case of fish. But what of property drifting on the sea ? It is possible to imagine cases in which such property would not be " derelicts, wrecks, flotsam,

jetsam and ligan", so as to be droits of Admiralty: goods in which property has not been lost, or has been acquired, so that the true owner might sue for their recovery against one who found them on the sea.

Suggestions as to property in cables.

The peculiar nature of a cable suggests that property in the whole is retained by a constructive possession resulting from its joinder with the shore: just as property in a whale would be asserted and retained if it were harpooned and being dragged through the water by the rope. It is admitted, as the learned Judges said, that an action for damage to the cable is maintainable in an English Court: the question is what law, if any, is applicable? On this point, unfortunately, the decisions throw no light other than is to be derived from the assumed application of English law. The analogy of the harpooned whale suggests that it should be the law to which the owner is subject: but possibly, by reason of the cable being fixed to the shore, the law governing the soil to which it is fixed would be held to be applicable. Cables are, however, more usually the property of public companies, and it is possible that this difficulty, as well as the further one arising from the fact that the cable may be attached at its two ends to different countries, might be got over by the application of the law of the country in which the company has its principal place of business: for it is on this law that its property in the cable depends. The question is an important one, as submarine cables often touch the shores of several countries.

With regard to property floating on the sea, the many variations of circumstances would probably find their solution in the law of property and possession.

Defence of property at sea.

It should be noted, however, that the right of self-defence exists on the sea. Person and property may be defended from assault or injury as well on the high sea as on dry land: the attack may be repelled by force sufficient to the purpose. Elementary conditions must, of course, be observed. Thus it is essential that there should be property: as if I have a whale in my possession, though not till then, it is manifest that I may repel attempts of others to take it.

By English law the law of the sea is not lawlessness.

The result of this analysis is to show that so far from the law of the sea being lawlessness, according to English principles all offences by British subjects on the high sea are covered by extension of the criminal law to the high sea: and practically

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for every wrong suffered on the high sea redress can be obtained in the English Courts, a redress which is by no means limited to English subjects.

Actions for wrongs at sea governed by same principles at actions for wrongs on land.

There is one last word to be said. The essential is that causes of action arising on the high sea are treated by precisely the same rules as causes of action arising on the land. There is no special law (apart from statutes) applicable to the sea, making acts wrongful when done upon it which are not wrongful when done upon the land.

In an argument which is historic, the proposition was advanced that the destruction of a shoal of fish at sea by dynamite was wrongful, and that damages could be sought at law between fishermen whose occupation and industry were prejudicially affected: or, failing this, that the Governments whose subjects were directly concerned should intervene. But the destruction of a shoal of free fish at sea could be no more wrongful than the destruction of a swarm of wild bees on land: for the plain reason that as there is no property in either, there is no one injured. International law does not carry the matter any further. There are municipal laws dealing with malicious injuries to property, but there is no international criminal law. There is the municipal law governing the redress which one party can obtain against another for wrongs done to him, but there is no international civil law of wrongs and damages for wrongs. But even if there were, it is impossible to imagine that either municipal or international law would deal with malicious injuries to things swimming free in the high sea,* and which are not yet property, giving redress to those who only hope to make them so. Protection for such things can only be effected by conventions, binding on the subjects of those nations which see fit to enter into them.

No action lies for destruction of free-swimming fish.

40 & 41 Vict. c. 65.

* The Fisheries (Dynamite) Act, 1877, punishes the use of dynamite in public fisheries, but only when committed within one marine league from the coast.

APPENDIX TO CHAPTER I.

APPENDIX A.

MERCHANT SHIPPING ACT, 1894.

57 & 58 Vict. c. 65.

Provisions as to arrest and imprisonment applying out of the United Kingdom.

223.—(1) If out of the United Kingdom, either at the commencement or during the progress of any voyage, a seaman or apprentice is guilty of the offence of desertion or of absence without leave, or otherwise absents himself from his ship without leave, the master, any mate, the owner, ship's husband, or consignee, may in any place in Her Majesty's dominions out of the United Kingdom, with or without the assistance of the local police officers or constables (and those officers and constables are hereby directed to give assistance if required), and also at any place out of Her Majesty's dominions, if and so far as the laws in force at that place will permit, arrest him without first procuring a warrant.

(2) A person so arresting a seaman or apprentice may in any case, and shall in case the seaman or apprentice so requires and it is practicable, convey him before some court capable of taking cognizance of the matter, to be dealt with according to law, and for that purpose may detain him in custody for a period not exceeding twenty-four hours, or such shorter time as may be necessary; but if the seaman or apprentice does not require to be so taken before a court, or if there is no such court at or near the place, the person arresting him may at once convey him on board his ship.

(3) If it appears to the court before whom the case is brought that an arrest under this section has been made on improper or on insufficient grounds, the master, mate, owner, ship's husband, or consignee who made the arrest, or caused it to be made, shall be liable to a fine not exceeding twenty pounds; but the infliction of that fine shall be a bar to any action for false imprisonment in respect of the arrest.

(4) If out of the United Kingdom, a seaman or apprentice is imprisoned for having been guilty of the offence of desertion or of absence without leave, or for having committed any other breach of discipline, and during his imprisonment and before his engagement is at an end, his services are required on board his ship, a justice of

the peace may, on the application of the master or of the owner or his agent, notwithstanding that the period of imprisonment is not at an end, cause the seaman or apprentice to be conveyed on board his ship for the purpose of proceeding on the voyage, or to be delivered to the master or any mate of the ship, or to the owner or his agent, to be by them so conveyed.

Power of court to order offender to be taken on board ship.

224.—(1) Where a seaman or apprentice is brought before a court on the ground of the offence of desertion, or of absence without leave, or of otherwise absenting himself without leave, the court, if the master or the owner or his agent so require, may (and if out of the United Kingdom in lieu of committing him to prison), cause him to be conveyed on board his ship for the purpose of proceeding on the voyage or deliver him to the master, or any mate of the ship, or the owner, or his agent, to be by them so conveyed, and may in such case order any costs and expenses properly incurred by or on behalf of the master or owner by reason of the offence to be paid by the offender, and, if necessary, to be deducted from any wages which he has then earned, or by virtue of his then existing engagement may afterwards earn.

(2) If in the United Kingdom a seaman or apprentice to the sea service intends to absent himself from his ship or his duty, he may give notice of his intention, either to the owner or to the master of the ship, not less than forty-eight hours before the time at which he ought to be on board his ship; and in the event of that notice being given, the court shall not exercise any of the powers conferred by this section by causing the offender to be conveyed on board his ship.

Deserters from foreign ships.

238.—(1) Where it appears to Her Majesty that due facilities are or will be given by the government of any foreign country for recovering and apprehending seamen who desert from British merchant ships in that country, Her Majesty may, by Order in Council, stating that such facilities are or will be given, declare that this section shall apply in the case of such foreign country, subject to any limitations, conditions, and qualifications contained in the Order.

(2) Where this section applies in the case of any foreign country, and a seaman or apprentice, not being a slave, deserts when within any of Her Majesty's dominions from a merchant ship belonging to a subject of that country, any court, justice, or officer that would have had cognizance of the matter if the seaman or apprentice had deserted from a British ship shall, on the application of a consular

officer of the foreign country, aid in apprehending the deserter, and for that purpose may, on information given on oath, issue a warrant for his apprehension, and, on proof of the desertion, order him to be conveyed on board his ship or delivered to the master or mate of his ship, or to the owner of the ship or his agent, to be so conveyed; and any such warrant or order may be executed accordingly.

(3) If any person harbours or secretes any deserter liable to be apprehended under this section, knowing or having reason to believe that he has deserted, that person shall for each offence be liable to a fine not exceeding ten pounds.

Naval Courts on the High Seas and Abroad.

Cases in which naval courts may be summoned.

480.—A court (in this Act called a naval court) may be summoned by any officer in command of any of Her Majesty's ships on any foreign station, or, in the absence of such an officer, by any consular officer, in the following cases; (that is to say,)

(i.) Whenever a complaint which appears to that officer to require immediate investigation is made to him by the master of any British ship, or by a certificated mate, or by any one or more of the seamen belonging to any such ship;

(ii.) whenever the interest of the owner of any British ship or of the cargo thereof appears to that officer to require it; and

(iii.) whenever any British ship is wrecked, abandoned, or otherwise lost at or near the place where that officer may be, or whenever the crew or part of the crew of any British ship which has been wrecked, abandoned, or lost abroad arrive at that place.

Functions of naval courts.

482.—(1) A naval court shall hear the complaint or other matter brought before them under this Act, or investigate the cause of the wreck, abandonment, or loss, and shall do so in such manner as to give every person against whom any complaint or charge is made an opportunity of making a defence.

(2) A naval court may, for the purpose of the hearing and investigation, administer an oath, summon parties and witnesses, and compel their attendance and the production of documents.

Penalty for preventing complaint or obstructing investigation.

485.—If any person wilfully and without due cause prevents or obstructs the making of any complaint to an officer empowered to summon a naval court, or the conduct of any hearing or investigation by any naval court, he shall for each offence be liable to a fine not exceeding

Chapter I fifty pounds, or be liable to imprisonment, with or without hard labour, for any period not exceeding twelve weeks.

APPENDIX

Jurisdiction in case of offences on board ship.

686.—(1) Where any person, being a British subject, is charged with having committed any offence on board any British ship on the high seas or in any foreign port or harbour or on board any foreign ship to which he does not belong, or, not being a British subject, is charged with having committed any offence on board any British ship on the high seas, and that person is found within the jurisdiction of any court in Her Majesty's dominions, which would have had cognizance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that court shall have jurisdiction to try the offence as if it had been so committed.

12 & 13 Vict. c. 96.

(2) Nothing in this section shall affect the Admiralty Offences (Colonial) Act, 1849.

Offences committed by British seamen at foreign ports to be within Admiralty jurisdiction.

687.—All offences against property or person committed in or at any place either ashore or afloat out of Her Majesty's dominions by any master, seaman, or apprentice who at the time when the offence is committed is, or within three months previously has been, employed in any British ship shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same courts and in the same places as if those offences had been committed within the jurisdiction of the Admiralty of England; and the costs and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England.

Provisions in case of Offences Abroad.

Conveyance of offenders and witnesses to United Kingdom or British possession.

689.—(1) Whenever any complaint is made to any British consular officer—

(*a*) That any offence against property or person has been committed at any place, either ashore or afloat, out of Her Majesty's dominions by any master, seaman, or apprentice, who at the time when the offence was committed, or within three months before that time, was employed in any British ship; or

(*b*) that any offence on the high seas has been committed by any master, seaman, or apprentice belonging to any British ship;

that consular officer may inquire into the case upon oath, and may, if the case so requires, take any steps in his power for the purpose of placing the offender under the necessary restraint and of sending him as soon as practicable in safe custody to the United Kingdom, or to any British possession in which there is a court capable of taking cognizance of the offence, in any ship belonging to Her Majesty or any of Her subjects, to be there proceeded against according to law.

(2) The consular officer may order the master of any ship belonging to any subject of Her Majesty bound to the United Kingdom or to such British possession as aforesaid to receive and afford a passage and subsistence during the voyage to any such offender as aforesaid, and to the witnesses, so that the master be not required to receive more than one offender for every one hundred tons of his ship's registered tonnage, or more than one witness for every fifty tons of that tonnage; and the consular officer shall endorse upon the agreement of the ship such particulars with respect to any offenders or witnesses sent in her as the Board of Trade require.

(3) Any master of a ship to whose charge an offender has been so committed shall, on his ship's arrival in the United Kingdom or in such British possession as aforesaid, give the offender into the custody of some police officer or constable, and that officer or constable shall take the offender before a justice of the peace or other magistrate by law empowered to deal with the matter, and the justice or magistrate shall deal with the matter as in cases of offences committed upon the high seas.

(4) If any master of a ship, when required by any British consular officer to receive and afford a passage and subsistence to any offender or witness, does not receive him and afford a passage and subsistence to him, or does not deliver any offender committed to his charge into the custody of some police officer or constable as hereinbefore directed, he shall for each offence be liable to a fine not exceeding fifty pounds.

(5) The expense of imprisoning any such offender and of conveying him and the witnesses to the United Kingdom or to such British possession as aforesaid in any manner other than in the ship to which they respectively belong, shall, where not paid as part of the costs of the prosecution, be paid out of moneys provided by Parliament.

APPENDIX B.

CUSTOMS LAWS CONSOLIDATION ACT, 1876.

39 & 40 Vict. c. 36.

Any vessel or boat arriving within the United Kingdom or the Channel Islands, or within three leagues thereof, having prohibited goods on board or attached thereto, forfeited.

179.—If any ship or boat shall be found or discovered to have been within any port, bay, harbour, river, or creek of the United Kingdom or the Channel Islands, or within three leagues of the coast thereof if belonging wholly or in part to British subjects, or having half the persons on board subjects of Her Majesty, or within one league if not British, having false bulkheads, false bows, double sides or bottom, or any secret or disguised place adapted for concealing goods, or any hole, tube, pipe, or device adapted for running goods, or having on board or in any manner attached thereto, or having had on board or in any manner attached thereto, or conveying or having conveyed in any manner any spirits, tobacco, or snuff, in packages of any size and character in which they are prohibted to be imported into the United Kingdom or the Channel Islands, or any spirits or tobacco or snuff imported contrary to the Customs Acts, or any tobacco stalks, tobacco stalk flour, or snuff work, or which shall be found or discovered to have been within three leagues of any part of the coast of the United Kingdom from which any part of the lading of such ship or boat shall be or have been thrown overboard, or on board which any goods shall be or have been staved or destroyed to prevent seizure, every such ship or boat, together with any such spirits, tobacco, or snuff, tobacco stalks, tobacco stalk flour, or snuff work, and all packages, casks, or other vessels containing the same, and everything packed therein, and also any cordage, or other articles adapted and prepared for slinging or sinking small casks, or any casks or other vessels whatsoever of less size or content than twenty gallons of the description used for the smuggling of spirits found on board, shall be forfeited; and every person who shall be found or discovered to have been on board any ship or boat liable to forfeiture as aforesaid, within three leagues of the coast if a British subject, or within one league if a foreigner, or on board any vessel in Her Majesty's service, or on board any foreign post office packet employed in carrying mails between any foreign country and the United Kingdom having on

Prohibited goods shipped or water-borne with intent to be exported, &c.

Persons found or discovered to have been on board vessels with contraband goods may be detained.

board any spirits or tobacco in such packages as aforesaid, or any tobacco stalks, tobacco stalk flour, or snuff work, shall forfeit a sum not exceeding one hundred pounds; and every such person may be detained and taken before any justice, to be dealt with as hereinafter directed; provided that no person shall be detained whilst actually on board any vessel in the service of a foreign state or country.

[*Customs Consolidation Act*, 1876, *Amendment Act*, 1887.

50 Vict. Sess. 2, c. 7.

Amendment of s. 179 of Customs Consolidation Act, 1876.

1.—The words following shall be added to the said section, and shall be taken and read as part of the same, viz.:—"And provided also, that no person shall be liable to conviction under this section unless there shall be reasonable cause to believe that such person was concerned in, or privy to, the illegal act or thing proved to have been committed."

Customs Consolidation Act, 1876, *Amendment Act*, 1890.

53 & 54 Vict. c. 56.

No ship to be liable to forfeiture unless under two hundred and fifty tons burden.

1.—No ship or boat shall be liable to forfeiture under the said section for having or having had on board, or in any manner attached thereto, or conveying or having conveyed, any goods as therein specified, or for any unlading, throwing overboard, or destruction of goods, unless such ship or boat shall be under two hundred and fifty tons burden.

Provisions as to ship of or exceeding two hundred and fifty tons burden.

2.—With regard to any ship or boat of or exceeding two hundred and fifty tons burden which but for this Act would be liable to forfeiture as aforesaid, the following provisions shall apply:—

(*a*) It shall be lawful for the Commissioners of Customs, hereinafter called "the Commissioners," subject to appeal to the Lords Commissioners of the Treasury, to have power to fine any such ship or boat in any sum not exceeding fifty pounds in any case where in their opinion a responsible officer (as hereinafter defined) of such ship or boat is implicated either actually or by neglect:

(*b*) For the purpose of enforcing such fine the Commissioners shall have power to require the deposit in the hands of the Collector of Customs at the port where such ship or boat shall be of such sum, not exceeding fifty pounds, as they may think right, pending their

ultimate decision, and in default of payment of such deposit the Commissioners shall have power to detain the said ship or boat:

(*c*) If in any case the Commissioners shall consider that the fine of fifty pounds aforesaid will not be an adequate penalty against any such ship or boat for the offence committed thereon, it shall be lawful for them to take proceedings before the justices of the peace for condemnation of the said ship or boat in a sum not exceeding five hundred pounds at the discretion of such justices, or such proceedings may be taken by the Commissioners before the courts and in manner prescribed by the Customs Consolidation Act, 1876, and the Acts amending the same. And for this purpose the Commissioners may as to any ship or boat referred to in this section require the deposit in the hands of the collector as aforesaid of a sum not exceeding five hundred pounds to abide the decision of the court, and in default of payment of such deposit the Commissioners may detain such ship or boat:

(*d*) No claim shall be made against the Commissioners for damages in respect of the payment of any deposit or the detention of any ship or boat under this section.

Definitions.

3.—The expression "responsible officer" in this Act shall mean and include the master, mates, and engineers of any ship, and in the case of a ship carrying a passenger certificate the purser or chief steward, and where the ship is manned by Asiatic seamen the serang or other leading Asiatic officer. The expression "neglect" in this Act shall include cases where goods unowned by any of the crew are discovered in a place or places in which they could not reasonably have been put if the responsible officer or officers having supervision of such place or places had exercised proper care at the time of the loading of the ship or subsequently; and the expression "burden" in this Act shall mean the same as it does in the Customs Consolidation Act, 1876, that is to say, "registered tonnage."

Saving of existing provision as to goods and persons on board.

4.—For the purpose of the forfeiture under the said one hundred and seventy-ninth section of goods, packages, casks, and the like, and the detaining and dealing with persons found or discovered to have been on board any ship or boat liable to forfeiture by the said section (as amended by the Customs Consolidation Act, 1876, Amendment Act, 1887), ships or boats of or exceeding two hundred and fifty tons burden shall still be deemed, but for such purpose only, to be ships or boats liable to forfeiture by the said section.]

Ships belonging to

180.—If any ship or boat belonging wholly or in part to Her Majesty's subjects, or having one half of the persons

Her Majesty's subjects, &c., throwing overboard any goods during chase, forfeited; and persons escaping deemed British subjects.

on board subjects of Her Majesty, shall not bring to upon signal made by any vessel or boat in Her Majesty's service or in the service of the Revenue, by hoisting the proper pendant and ensign, whereupon chase shall be given, and any person on board such ship or boat shall, during chase or before such ship or boat shall bring to, throw overboard any part of her lading, or shall stave or destroy any part thereof to prevent seizure, such ship or boat shall be forfeited; and all persons escaping from any such ship or boat during chase shall be deemed subjects of Her Majesty, unless the contrary be proved.

Ships not bringing to when required to, penalty, 20*l.*

181.—If any ship or boat liable to seizure or examination under the Customs Act shall not bring to when required so to do, the master of such ship or boat shall forfeit the sum of twenty pounds; and on such ship or boat being chased by any vessel or boat in Her Majesty's navy, having the proper pendant and ensign of Her Majesty's ships hoisted, or by any vessel or boat duly employed for the prevention of smuggling, having a proper pendant and ensign hoisted, it shall be lawful for the captain, master, or other person having the charge or command of such vessel or boat in Her Majesty's navy, or employed as aforesaid (first causing a gun to be fired as a signal), to fire at or into the ship or boat, and such captain, master, or other person acting in his aid or by his direction shall be and is hereby indemnified and discharged from any indictment, penalty, action, or other proceeding for so doing.

Not bringing to, may be fired into.

As to boarding and departure of ships after clearance.

Officer may board ship after clearance.

134.—Any officer of Customs may go on board any ship after clearance outwards within the limits of any port in the United Kingdom, or within one league of the coast thereof, and may demand the ship's clearance, and if the master shall refuse to produce the same and answer such questions concerning the ship, cargo, and intended voyage as may be demanded of him, he shall forfeit the sum of five pounds.

Only officers to take up spirits in casks sunk or floating upon the

200.—If any person not being an officer of the navy, Customs, or Excise shall intermeddle with or take up any spirits being in casks of less content than twenty gallons found floating upon or sunk in the sea, such spirits shall be forfeited, together with any vessel or boat in which they

sea, and persons giving information may be rewarded.

may be found; but if any person shall give information to any such officer so that seizure of such spirits may be made, he shall be entitled to such reward as the Commissioners of Customs may direct.

Offences on the water, &c., and jurisdiction.

229.—Where any offence shall be committed in any place upon the water not being within any county of the United Kingdom, or where the officers have any doubt whether such place is within the boundaries or limits of any such county, such offence shall for the purposes of the Customs Acts be deemed and taken to be an offence committed on the high seas; and for the purpose of giving jurisdiction under such Acts every offence shall be deemed to have been committed, and every cause of complaint to have arisen, either in the place in which the same actually was committed or arose, or in any place on land where the offender or person complained against may be or be brought.

APPENDIX C.

QUARANTINE ACT, 1825.

6 Georgii IV. c. 78.

Goods and vessels specified in any Order of Council subject to quarantine; as also all vessels arriving from any port under suspicious circumstances as to infection.

V. And whereas certain sorts of goods and merchandize are more especially liable to retain infection, and may be brought from places infected into other countries, and from thence imported into the United Kingdom, or the islands aforesaid; be it enacted, That all such goods and merchandize as shall be particularly specified for that purpose in any Order or Orders made by His Majesty, His heirs or successors, in Council, concerning quarantine and the prevention of infection as aforesaid, which shall be brought or imported into any port or place in the United Kingdom, or the islands aforesaid, from any foreign country or place, in any vessel whatever, and the vessels in which the same shall be brought, and also all vessels which shall arrive from any port or place whatever, under any alarming or suspicious circumstances as to infection, shall be subject and liable to such regulations and restrictions as shall be made by such Order or Orders

of His Majesty, His heirs or successors, in Council as aforesaid, respecting the same.

Masters of vessels liable to quarantine to make signals on meeting other vessels at sea, or being within two leagues of the United Kingdom, or Guernsey, &c., on penalty of 100*l.*

VIII. And be it further enacted, That every commander, master, or other person having the charge of any vessel liable to the performance of quarantine, shall be and is hereby required, at all times, when such vessel shall meet with any other vessel at sea, or shall be within two leagues of the coast of the United Kingdom, or the islands of Guernsey, Jersey, Alderney, Sark, or Man, to hoist a signal to denote that his vessel is liable to the performance of quarantine, which signal shall in the day-time, if the said vessel shall have a clean bill of health, a large yellow flag, of six breadths of bunting, at the maintop mast-head, and if such vessel shall not have a clean bill of health, then a like yellow flag, with a circular mark or ball, entirely black in the middle thereof, whose diameter shall be equal to two breadths of bunting; and in the night-time the signal shall in both cases be a large signal lanthorn with a light therein (such as is commonly used on board His Majesty's ships of war), at the same mast-head; and such commander, master, or other person shall keep such signals respectively, as the case shall be, hoisted during such time as the said vessel shall continue within sight of such other vessel, or within two leagues of the said coasts or islands, and while so in sight, or within such distance, until such vessel so liable to quarantine as aforesaid shall have arrived at the port or place where it is to perform quarantine, and until it shall have been legally discharged from the performance thereof; on failure whereof such commander, master, or other person having charge of such ship or vessel so liable to the performance of quarantine shall forfeit and pay for every such offence the sum of one hundred pounds.

Masters of vessels to hoist certain signals when plague or infectious disease on board, on penalty of 100*l.*

IX. And be it further enacted, That every commander, master, or other person having the charge of any vessel on board whereof the plague or other infectious disease or distemper highly dangerous to the health of His Majesty's subjects shall actually be, shall be and is hereby required at all times when such vessel shall meet with any other vessel at sea, or shall be within two leagues of the coast of the United Kingdom, or the islands of Guernsey, Jersey, Alderney, Sark, or Man, to hoist a signal to denote that his vessel has the plague or other infectious disease or distemper

highly dangerous to the health of His Majesty's subjects actually on board thereof, which signal shall be in the day-time a flag of yellow and black, borne quarterly, of eight breadths of bunting, at the maintop mast-head; and in the night-time, the signal shall be two large signal lanthorns, such as are commonly used on board of His Majesty's ships of war, one over the other, at the same mast-head; and such commander, master, or other person shall keep such signal hoisted during such time as the said vessel so having the plague or such other infectious disease or distemper as aforesaid on board thereof, shall continue within sight of such other vessel, or within two leagues of the coasts or islands aforesaid, while so in sight or within such distance, until such vessel so having the plague or such other infectious disease or distemper as aforesaid on board thereof, shall have arrived at the port or place where it is to perform quarantine, and until it shall have been legally discharged from the performance thereof; on failure thereof such commander, master, or other person having charge of such vessel shall forfeit and pay for every such offence the sum of one hundred pounds.

Penalty on persons hoisting signals when not liable, 50*l.*

X. And be it further enacted, That if any commander, master, or other person having the charge or command of any vessel, and knowing that the same is not liable to the performance of quarantine, shall hoist such signal as aforesaid, or either of them, by day or night respectively, such commander or other person as aforesaid shall forfeit and pay the sum of fifty pounds.

APPENDIX D.

PUBLIC HEALTH ACT, 1875.

38 & 39 Vict. c. 55.

130.—The Local Government Board may from time to time make, alter, and revoke such regulations as to the same Board may seem fit, with a view to the treatment of persons affected with cholera, or any other epidemic, endemic, or infectious disease, and preventing the spread of cholera and such other diseases as well on the seas, rivers, and waters of the United Kingdom, and on the high seas

within three miles of the coasts thereof, as on land ; and may declare by what authority or authorities such regulations shall be enforced and executed. Regulations so made shall be published in the *London Gazette*, and such publication shall be for all purposes conclusive evidence of such regulations. Any person wilfully neglecting or refusing to obey or carry out or obstructing the execution of any regulation made under this section, shall be liable to a penalty not exceeding fifty pounds.

134.—Whenever any part of England appears to be threatened with or is affected by any formidable epidemic, endemic, or infectious disease, the Local Government Board may make, and from time to time alter and revoke, regulations for all or any of the following purposes ; namely—

(1) For the speedy interment of the dead ; and

(2) For house-to-house visitation ; and

(3) For the provision of medical aid, and accommodation for the promotion of cleaning, ventilation, and disinfection, and for guarding against the spread of disease ;

and may by Order declare all or any of the regulations so made to be in force within the whole or any part or parts of the district of any local authority, and to apply to any vessels, whether on inland waters or on arms or parts of the sea within the jurisdiction of the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of the Lord High Admiral for the time being, for the period in such Order mentioned ; and may by any subsequent Order abridge or extend such period.

PUBLIC HEALTH ACT, 1896.

59 & 60 Vict. c. 19.

Amendment of 38 & 39 Vict. c. 55, ss. 130, 134, as to regulations with respect to disease.

1.—(1) Regulations of the Local Government Board made in pursuance of section one hundred and thirty or section one hundred and thirty-four of the Public Health Act, 1875, or in pursuance of either of those sections, as extended to London by the Public Health (London) Act, 1891, may provide for such regulations being enforced and executed by the officers of Customs and the officers and men employed in the Coastguard as well as by other authorities and officers, and without prejudice to the generality of the powers conferred by those sections may provide for—

(*a*) The signals to be hoisted by vessels having any case of epidemic, endemic, or infectious disease on board ; and

(*b*) the questions to be answered by masters, pilots, and other persons on board any vessel as to cases of such disease on board during the voyage or on the arrival of the vessel ; and

(*c*) the detention of vessels and of persons on board vessels ; and

(*d*) the duties to be performed in cases of such disease by masters, pilots, and other persons on board vessels.

(2) Provided that the regulations shall be subject to the consent—

(*a*) So far as they apply to the officers of Customs, of the Commissioners of Her Majesty's Customs ; and

(*b*) so far as they apply to officers or men employed in the Coast-guard, of the Admiralty ; and

(*c*) so far as they apply to signals, of the Board of Trade.

(3) If any person wilfully neglects or refuses to obey or carry out, or obstructs the execution of, any regulation made under section one hundred and thirty or section one hundred and thirty-four of the Public Health Act, 1875, or in pursuance of either of those sections as extended to London by the Public Health (London) Act, 1891, and as amended by this Act, he shall be liable to a penalty not exceeding one hundred pounds, and in the case of a continuing offence to a further penalty not exceeding fifty pounds for every day during which the offence continues ; and any such penalty, if not recovered under the provisions of the Acts relating to public health, shall be recoverable by action on behalf of the Crown in the High Court.

54 & 55 Vict. c. 76.

Transfer of powers under 39 & 40 Vict. c. 36, s. 234.

2.—The powers exercisable by Her Majesty in Council or any two of the Lords of Her Majesty's Privy Council under section two hundred and thirty-four of the Customs Consolidation Act, 1876, shall be exercisable by the Local Government Board, and accordingly in that section the words "the Local Government Board" shall be substituted for the words "Her Majesty in Council, or any two Lords of Her Majesty's Privy Council."

Public Health Regulations as to Cholera, Yellow Fever, and Plague Ports (General).

(9th November, 1896.)

Article 25.—The master of every ship infected with cholera, yellow fever, or plague, shall, when within three miles of the coast of any part of England or Wales, cause to be hoisted at the mast-head, or where best seen, a large flag of yellow and black, borne quarterly, and shall keep the same displayed during the whole of the time between sunrise and sunset, and no person (other than an officer of Customs, or a person acting in the execution of this Order) shall leave such ship until after such visit of the officer of Customs as is mentioned in Article 2, or until after the visit of the medical officer of health in pursuance of Article 8.

CUSTOMS LAWS CONSOLIDATION ACT, 1876.

39 & 40 Vict. c. 36.

Persons arriving in ships from infected places not to land before examination.

234.—It shall be lawful for Her Majesty in Council, or any two of the Lords of Her Majesty's Privy Council, from time to time, by Her or their order, to require that no person on board any ship coming to any port in the United Kingdom, the Channel Islands, or the Isle of Man, from or having touched at any place out of the United Kingdom abroad where they have reason to apprehend that yellow fever or other highly infectious distemper prevails, shall quit such vessel before the state of health of the persons on board shall have been ascertained, on examination by the proper officer of Customs, at such place or places as may from time to time be appointed by the Commissioners of Customs for such purpose, and before permission to land shall have been given by such officer, whether or not it shall on or after such examination be found expedient to order such vessel under the restraint of quarantine, and any person so quitting any such vessel shall forfeit a sum not exceeding one hundred pounds; and if the master, pilot, or person in charge of such a ship shall not, on arrival at such place, hoist and continue such signal as shall be directed by such Order until the proper officer shall have given permission to haul down the same, he

shall forfeit a like penalty; and such penalties or either of them if incurred, and any penalty incurred under the Act of the sixth year of the reign of King George the Fourth, chapter seventy-eight, shall be subject to reduction to any sum not exceeding one hundred pounds, and may be recovered by information and summons before a stipendiary magistrate, or any two justices of the peace, who are hereby authorized to reduce the same accordingly, and to commit the offender to prison in default of payment of any penalty so imposed for any period not exceeding six months.

Chapter II.

The substance of the Extra-territorial Criminal Law of England.

Extra-territorial legislation may be divided into two main groups : that which deals with the high sea alone, and that which has the wider scope indicated by the words "beyond the realm". Much of it is criminal law : but the criminal statutes which must be first examined are not exhaustive of the subject ; there are others, some criminal, some civil, which will be considered hereafter. Those which are collected in this chapter† deal with offences which are part of the general criminal law of the land.

Chapter II

PIRACY.

LEGISLATION APPLICABLE TO THE HIGH SEA.

28 Hen. VIII, c. 15.

" Offences at Sea Act, 1536 "—*for punishment of Pirates and Robbers at Sea.*

The preamble recites that " traitors pirates thieves robbers murtherers and confederates upon the sea " many times escaped punishment because the trial before the Admiral " after the course of the civil laws " required a plain confession of guilt, or direct proof by eye-witness indifferent before judgment of death could be given : which was rendered oftentimes impossible by

† *NOTE.*

It is essential to the understanding of the principles which underlie this legislation and control its application and which will be discussed in the subsequent chapters, that the whole body of the law should be presented to the reader in the most convenient form possible, so that all parts of it may be readily accessible when the discussion of principles makes reference to them necessary. A collection of all the statutes in an Appendix though convenient from one point of view, would have had the inconvenience from the point of view of our enquiry, that the points which it will be necessary to refer to in the texts would have been lost to sight in a mass of words with which we shall have no concern. I have therefore collected all those enactment in one chapter, treating them, however, in an arbitrary manner : setting out the full text where this seemed expedient, but contenting myself with a condensation where that was possible ; the actual words relating to questions of jurisdiction or other matters with which we shall have to deal however are preserved.

the fact that the witnesses were killed, or else were taken by their occupations again to sea.

Trial of offences committed upon the sea by King's commission.

1.—All treasons felonies robberies murthers and confederacies committed in or upon the sea, or in any other haven, river, creek or place where the Admiral or Admirals have or pretend to have power, authority or jurisdiction, shall be inquired, tried, heard, determined and judged in such shires and places in the realm as shall be limited by the King's commission... in like form and condition as if any such offence had been committed or done in or upon the land.

The Commission is to be directed to the Admiral and to three or four other substantial persons chosen by the Lord Chancellor,—

to hear and determine such offences after the common course of the laws of this realm, used for treasons felonies murthers robberies and confederacies of the same done and committed upon the land within this realm.

Procedure to be followed, trial by injury, and sentence of death, are dealt with by s. 2.

The Act is not to apply to persons taking "any victual, cables, rope, anchors or sails" which such person " (compelled by necessity) taketh of or in any ship which may conveniently spare the same ", so that he pay out of hand for the same in money-worth or by a sufficient bill to be paid, on this side of this Straits of Marroke in 4 months, and the bills are paid. [s.4.]

11 & 12 Will. III, c. 7.

" Piracy Act, 1698 "—*for the more effectual suppression of Piracy.*

The preamble recites that persons committing piracies, robberies and felonies on the seas in or near the East and West Indies, and in places very remote could not be brought to condign punishment without being sent to England for trial under the Act of Henry VIII : by reason whereof many idle and profligate persons had been induced to turn pirates, their numbers increasing and their insolences being great, so that it was necessary to provide some speedy remedy for putting the ancient laws in execution.

Natural-born subjects or denizens committing piracy or robbery or any act of hostility against the King's subjects upon the sea, under colour of any commission from any foreign Prince or pretence of authority from any person, are to be deemed pirates, felons and robbers. [s. 7.]

Commanders of ships or seamen who betray their trust and turn pirates, enemies or rebels, and run away with their ship, or any boat, ammunition or goods, or yield them up voluntarily to any pirate, or bring

seducing messages from any pirate, enemy or rebel, or who consult, combine or confederate with, or attempt to corrupt any commander or seaman to yield up, or run away with, any ship or goods, or turn pirate, or go over to pirates: or persons who lay violent hands on the commander thereby to hinder him from fighting in defence of his ship or goods, or who confine the master, or who make or endeavour to make a revolt in the ship, are to be deemed pirates, felons and robbers. [s. 8.]

Persons aiding pirates, &c., who shall thereupon act, adjudged accessories.

9.—And whereas several evil-disposed persons, in the plantations and elsewhere have contributed very much towards the increase and encouragement of pirates, by setting them forth, and by aiding, abetting, receiving and concealing them and their goods, and there being some defects in the laws for bringing such evil-disposed person to condign punishment:—All and every person and persons whatsoever who shall either on the land, or upon the seas knowingly or wittingly, set forth any pirate, or aid and assist, or maintain, procure, counsel, or advise any person or persons whatsoever, to do or commit any piracies or robberies upon the seas, and such person or persons shall thereupon do or commit such piracy or robbery, then all and every such person or persons whatsoever, so as aforesaid setting forth any pirate, or aiding, assisting, procuring, maintaining, commanding, counselling or advising the same, either on the land or upon the sea, shall be and are hereby declared and shall be deemed and adjudged to be accessory to such piracy and robbery done and committed.

Any person upon the land or upon the sea who receives, entertains, or conceals a pirate, or who receives or takes into his custody any ship or goods piratically taken, is to be deemed accessory to such pirate. [s. 10].

In order to encourage commanders and sailors to defend their ships against pirates, rewards are to be granted by the Court of Admiralty, [s. 11]: and also to informers of conspiracies to run away with or destroy ships or goods [s. 12].

The procedure of trial by commission under 26 Hen. VIII. c. 15, is extended to the American Colonies, the Commissioners appointed holding the trial in the Colony to which pirates upon the sea or accessories to piracy are brought in virtue of the warrant for seizure: the Governors of Colonies being required to assist the Commissioners. [s. 14.]

The Statute of 1698 was made clearer by *the Piracy Act, 1717* [*4 Geo. I, c. 11, s. 7*], which provides that the offences created by it are to be tried as provided by the Statute of Henry VIII.

8 George I, c. 24.

"Piracy Act 1721"—*for the more effectual suppression of Piracy.*

The preamble recites that piracies were still increasing, and that further provision was necessary to bring pirates in remote parts to condign punishment.

Chapter II

PIRACY.

Commanders of ships or others, trading with pirates, furnishing them with stores, corresponding with them, &c., shall be adjudged guilty of piracy.

1.—If any commander or master of any vessel, or any other person or persons, shall any wise trade with any pirate, by truck, barter, exchange, or in any other manner, or shall furnish any pirate, felon or robber upon the seas, with any ammunition, provision, or stores of any kind, or shall fit out any ship or vessel knowingly, and with a design to trade with, or supply or correspond with any pirate, felon, or robber upon the seas, knowing him to be guilty of any such piracy, felony, or robbery, such offender and offenders and every of them shall, in each and every of the said cases, be deemed, adjudged, and taken to be guilty of piracy, felony, and robbery, and he and they shall and may be enquired of, tried, heard, and adjudged of and for all or any the matters aforesaid according to the Statute 28 Hen. VIII, c. 15, for pirates, and the Statute 11 & 12 Will. III, c. 7, intituled "an Act for the more effectual suppressing of piracy", which by an Act, 6 Geo. I, c. 19, is made perpetual; and he and they being convicted of all or any the matters aforesaid shall suffer such pains of death, loss of lands, goods, and chattels, as pirates, felons, and robbers upon the seas ought to suffer; and in case any persons belonging to any ship or vessel whatsoever, upon meeting any merchant ship or vessel on the high seas, or in any port haven or creek whatsoever shall forcibly board or enter into such ship or vessel, and though they do not seize and carry off such ship or vessel shall throw overboard or destroy any part of the goods or merchandise belonging to such ship or vessel, the persons who shall be guilty thereof shall in all respects be deemed and punished as pirates as aforesaid.

Ships fitted out to trade with pirates, and all goods on board, are to be forfeited: half to go to the informer and half to the Crown. [s. 2.]

Persons declared to be accessories to piracy by the Statute of William III are to be deemed and to suffer as pirates. [s. 5]

Commanders, officers, and seamen of any merchant ship which carries guns and arms, who do not defend the ship when attacked by pirates, or who utter words to discourage the other mariners from defending the ship, and by reason thereof the ship falls into the hands of the pirates are to forfeit all wages due, and to suffer six months imprisonment. [s. 6]

There is an earlier Act, *22 & 23 Ch. II, c. 11*—"*to prevent the delivery up of Merchant Ships, and for the increase of good and serviceable Shipping*"—also directed against piracy, which runs parallel to a certain extent with the Piracy Act here referred to.

18 Geo. II c. 30.

"Piracy Act 1744"—*to amend the Act 11 & 12 William III, c. 7.*

After referring to the provisions of the Act of William III, the preamble recites that during the wars with France and Spain, the King's subjects had entered the service of his enemies on

board privateers and ships under commissions from the Crowns of France and Spain, and had committed divers hostilities against the King's subjects upon the seas in the West Indies and other parts, and that doubts had arisen whether as they had been guilty of high treason they could be deemed guilty of felony under that Act, "and as such liable to be tried by the said Court of Admiralty appointed or to be appointed in virtue of the said Act".

Hostilities committed by subjects against subjects.

1.—All persons being the natural-born subjects or denizens of his Majesty who during the present or any future wars have committed or shall commit any hostilities upon the sea, or in any haven river creek or place where the Admiral or Admirals have power, authority or jurisdiction, against His Majesty's subjects by virtue or under colour of any commission from any of His Majesty's enemies, or have been or shall be any other ways adherent or giving aid or comfort to His Majesty's enemies upon the sea, or in any haven, river, creek or place where the Admirals or Admiral have power authority or jurisdiction, may be tried as pirates, felons and robbers in the said Court of Admiralty, on shipboard or upon the land, in the same manner as persons guilty of piracy felony and robbery are by the said Act directed to be tried...

Such persons are not liable to be tried again in Great Britain or elsewhere for the same act as high treason: but if not tried under this Act then they may be tried for high treason under 28 Hen. VII, c. 15: *i.e.* for treason committed on the high seas. [ss. 2, 3.]

The Felony and Piracy Act 1772, [12 Geo. III, c. 20], and *the Criminal Law Act, 1827* [7 & 8 Geo. IV c. 28], ss. 1 and 2, need not be noticed, as they deal only with the procedure at the trial of pirates.

The Piracy Act, 1837 [7 Will. IV & 1 Vict. c. 88], specially provides for the punishment of piracy by death when coupled with an intent to murder. Accessories before the fact are to be punished in the same way as principals in the first degree, and accessories after the fact are liable to imprisonment not exceeding two years.

The last *Piracy Act* was passed in 1850— [13 & 14 Vict. c. 26]. It gave jurisdiction to the High Court of Admiralty in England and to all Colonial Courts of Vice-Admiralty—now Colonial Courts of Admiralty, by 53 & 54 Vict. c. 29—to determine whether persons attacked by any of His Majesty's ships of war were pirates as alleged, with a view to assignment of fitting rewards to the officers and crew engaged.

Chapter II

OFFENCES AT SEA.

From the Piracy Acts we pass to another group, known generically as the "Offences at Sea" and "Admiralty Offences" Acts, the first of which was passed in 1799. It will be noticed that this group also springs from the Statute of Henry VIII.

39 Geo. III, c. 37.

"Offences at Sea Act, 1799"—*for remedying certain defects in the law respecting offences committed on the High Seas.*

After reciting that treasons, felonies, robberies, murders and confederacies committed on the high seas may be tried in virtue of 28 Hen. VIII c. 15, the preamble declares it to be expedient that other offences "committed on the seas" may be tried in like manner.

Offences at sea triable as if committed on shore.

1.—All and every offence and offences which shall be committed upon the high seas out of the body of any county of this realm shall be and they are hereby declared to be offences of the same nature respectively, and to be liable to the same punishments respectively, as if they had been committed upon the shore: and shall be enquired of, heard, tried, and determined and adjudged in the same manner as treasons, felonies, and confederacies are directed to be by the same Act.

Verdict of manslaughter on trial for murder.

2.—When any person shall be tried for the crime of murder or manslaughter committed upon the sea, by virtue of any commission directed under the said Act, and shall be found guilty of manslaughter only, such person...shall be subject to the same punishment as if he had committed such manslaughter in or upon the land.

The following Act holds the same position with regard to the 11 & 12 Will. III, c. 7, as the last Act does to the Act of Henry VIII: that is to say, it extends the power to try piracies in the Colonies to all offences.

46 Geo. III c. 54.

"Offences at Sea Act, 1806"—*for the more speedy trial of offences committed in distant parts upon the sea.*

After referring to the Acts of Henry VIII and William III, the preamble recites that certain offences not mentioned in the latter Act cannot be tried by virtue of a commission under it, and that persons committing them upon the seas near the East and West Indies and in places very remote could only be tried in England under the earlier Act: and continues—

For remedy whereof and in order that one uniform course of trial may be had for all treasons piracies felonies robberies murders conspiracies and other offences committed upon the seas:—

All offences at sea triable by King's commission in the Colonies.

1.—All treasons piracies felonies murders conspiracies and other offences of what nature or kind soever committed upon the sea or in any haven river creek or place where the Admiral or Admirals have power authority or jurisdiction, may be enquired of tried heard determined and adjudged according to the common course of the laws of this realm used for offences committed upon the land within this realm, and not otherwise, in any of His Majesty's Colonies by virtue of the King's commission directed to any such four or more discreet persons as the Lord Chancellor shall think fit to appoint.

The Commissioners are to have the same powers, and the trial is to proceed in the same manner, as is provided in the Act of Henry VIII. The punishment is to be awarded according to the law of England.

The Admiralty Offences Act, 1826 [7 Geo. IV, c. 38], provides that any Commissioner "named in the commission of oyer and terminer, for the trying of offences committed within the jurisdiction of the Admiralty of England", and also any Commissioner appointed under 46 Geo. III, c. 54, may take examinations of witnesses "touching any treason piracy felony robbery murder conspiracy or other offence or what nature or kind soever committed upon the sea, or in any haven river creek or place where the Admiral or Admirals hath or have power authority or jurisdiction".

The Act *4 & 5 Will. IV, c. 36*, which created the Central Criminal Court, gave by s. 22, the Court jurisdiction to try any offence committed on the high seas and other places within the jurisdiction of the Admiralty of England.

7 & 8 Vict. c. 2.

Admiralty Offences Act 1844—*for the more speedy trial of offences committed on the High Seas.*

After referring to the Act of Henry VIII, the preamble declares that it is expedient that persons charged with "offences so committed" should be tried without any special commission: and s. 1 provides that the Justices of Assize are to have all the powers given by any Act to "the Commissioners named in any Commission of oyer and terminer for the trying of offences committed within the jurisdiction of the Admiralty of England", and are to have power to try "all offences alleged to have been committed on the high seas and other places within the jurisdiction of the Admiralty of England". By s. 2 the venue is to be laid in the county in which the trial takes place, and the facts

Chapter II in the indictment are to be averred to have taken place " on the high seas ". Sec. 3 refers to the powers of Justices to take informations under 7 Geo. IV, c. 38, "touching any offence committed with the jurisdiction of the Admiralty of England ".

OFFENCES AT SEA.

Trial by Commission and jurisdiction of C.C.C. preserved.

4.—Provided always that nothing herein contained shall affect the jurisdiction belonging to the Central Criminal Court for the trial of persons charged with offences committed on the high seas and other places within the jurisdiction of the Admiralty of England, or to restain the issue of any special commission under the first recited Act [28 Hen. VIII, c. 15] for the trial of such offenders if need be.

11 & 12 Vict. c 42,

" Indictable Offences Act, 1848. "

Warrant of arrest.

2.—In all cases of indictable crimes and offences of any kind or nature whatsoever committed on the high seas, or in creek, harbour, haven, or other place in which the Admiralty of England have or claim to have jurisdiction, and in all cases of crimes or offences committed on land beyond the sea for which an indictment may legally be preferred in any place within England or Wales,—

a Justice of the Peace for any place in which the person charged shall reside or be, or shall be supposed or suspected to reside or be, may issue a warrant† for his apprehension. "

The Criminal Law Amendment Act, 1867 [30 & 31 Vict. c. 35], s. 3, provides that the duty of the Justices of the Peace to take the depositions of the witnesses of the accused extends to the witnesses of persons charged with any indictable offence " whether committed within the realm or upon the high seas or upon land beyond the sea ".

THE CRIMINAL LAW CONSOLIDATION ACTS OF 1861.

CRIMINAL LAW.

The Accessories and Abettors Act, 1861 [24 & 25 Vict.c. 94.]: s. 7 first lays down the fundamental principle that in case of felonies committed in England or Ireland, accessories either before or after the fact may be tried and punished by the Court

† The form of warrant in the Schedule is as follows—

(E)

WARRANT TO APPREHEND A PERSON CHARGED WITH AN INDICTABLE OFFENCE COMMITTED ON THE HIGH SEAS OR ABROAD.

For offences committed on the high seas the warrant may be the same as in ordinary cases, but describing the offence to have been committed " on the high seas out of the body of any county of this realm, and within the jurisdiction of the Admiralty of England. "

For offences committed abroad for which the parties may be indicted in this country the warrant also may be in the same form as in ordinary cases, but describing the offence to have been committed " on land out of the United Kingdom, to wit at in the Kingdom of ", *or* " at , in the East Indies ", *or* " at in the Island of in the West Indies ; " *or as the case may be.*

having jurisdiction to try the principal felony or having jurisdiction to try felonies in the county in which the act was committed which constitutes the acceding or abetting. Secondly, this section provides that "in every other case" *i. e.* in the case of felonies not wholly committed in England or Ireland, accessories either before or after the fact may be tried and punished by any Court having jurisdiction to try the principal felony, or having jurisdiction to try felonies in the country where the accessory is apprended or in custody, "whether the principal felony shall have been committed on the sea, or on the land, or begun on the sea and completed on the land, or begun on the land and completed on the sea, and whether within Her Majesty's dominions or without, or partly within Her Majesty's dominions and partly without."

The offence of being accessory "within the jurisdiction of the Admiralty to any felony," whether such felony is committed within that jurisdiction or elsewhere, or was begun within that jurisdiction and completed elsewhere, or was begun elsewhere and completed within that jurisdiction, is dealt with by s. 9 : the offence is to be averred to have been committed "on the high seas".

With regard to the other statutes of the same year, 24 & 25 Vict. cc. 96 to 100, it will be sufficient merely to indicate the offences with which they deal.

The Larceny Act, 1861 [24 & 25 Vict. c. 96], deals with —

larceny
assault with intent to rob
robbery with violence
threatening letters
embezzlement
fraud by trustees and directors
obtained goods, money, or securities, by false pretences
inducing persons by fraud to execute deeds or other instruments
receiving stolen goods, and
accessories in such offences ;

and, by s. 115, includes all these offences when committed within the jurisdiction of the Admiralty.

The Malicious Damage Act. 1861 [25 & 25 Vict. c. 97], deals with—

arson
injury by exploisive substances

setting fire to, casting away, or destruction of ships
exhibiting false signals
removing or concealing buoys or other seamarks
destroying wrecks or articles belonging thereto
sending threatening letters to burn or destroy houses, buildings, ships &c.
malicious injury to other property
making gunpowder or explosives with intent to commit any of such offences, and
accessories in such offences ;

and, by s. 72, includes all these offences when committed within the jurisdiction of the Admiralty.

The Forgery Act, 1861 [24 & 25 Vict, c. 93], deals with—

forgery of the Great or Privy Seal
forgery generally
personation of the owner of stock, and transferring or receiving, or endeavouring to transfer or receive the dividends
making and engraving plates &c. for bank notes
falsely acknowledging recognizances &c.
demanding property upon forged instruments, and
accessories in such offences.

and, by s. 50, includes all these offences when committed within the jurisdiction of the Admiralty.

The Coinage Offences Act. 1861 [24 & 25 Vict. c. 99], deals with—

counterfeiting, uttering, unlawful posssession of, importing or exporting, and all offences in connection with coinage, and coining tools, and accessories in such offences ;

and, by s. 36, includes all these offences when committed within the jurisdiction of the Admiralty.

The Offences against the Person Act, 1861 [24 & 25 Vict. c. 100], deals with—

homicide,
attempts to murder by administering poison, wounding, setting fire to ships &c.
letters threatening to murder
acts causing or tending to cause danger to life or bodily harm
assaults
rape, abduction, and defilement of women
child-stealing
bigamy
attempts to procure abortion
concealing the birth of children

unnatural offences

making gunpowder to commit offences.

and, by s. 58, includes all these offences when committed within the jurisdiction of the Admiralty.

So much for the general application of these statutes of 1861 to the high seas. But there are certain offences dealt with by them which may be termed appropriately "high sea offences", as being more likely to be committed on sea than on shore, and which, when committed at sea, fall within the purview of the Admiralty sections indicated above. These offences are the following :—

Offences specially applicable to the sea.

Under 24 & 25 Vict. c. 96.

Larceny of ships or cargo.

stealing from ships— s. 63.

stealing from ships in distress or wrecked—s. 64.

possession of shipwrecked goods without giving a stisfactory account—s. 65.

offering shipwrecked goods for sale—s. 66.

Under 24 & 25 Vict. c. 97.

Malicious damage to ships or cargo.

setting fire to, casting away, or in any way destroying ships whether complete or unfinished—s. 42.

the same, with intent to prejudice the owner of the ships or goods on board, or the underwriters—s. 43.

attempts at the same—s. 44.

placing gunpowder in or near a vessel with intent to damage it or its machinery or goods—s. 45.

damaging ships otherwise than by fire, gunpowder or other explosives—s. 46.

masking, altering, or removing, lights or signals, or exhibiting false lights or signals, with intent to bring ships into danger: or maliciously doing anything tending to the immediate destruction of a ship for which no punishment is provided—s. 47.

cutting away, casting adrift, removing, altering, defacing, sinking, or destroying, or maliciously injuring or concealing any boat, buoy, rope, perch, or mark, used or intended for the guidance of seamen, or for the purposes of navigation—s. 48.

maliciously destroying any part of a ship in distress, or wrecked, stranded, or cast on shore, or any goods or articles belonging thereto—s. 49.

Under 24 & 25 Vict. c. 100.

Injuries to persons in connection with ships.

sending letters threatening to burn or destroy grain or other agricultural produce in a ship—s. 50.

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setting fire to a ship or its tackle or goods therein, or casting away or destroying a ship with intent to murder—s. 13.

impeding a person being on board of, or having quitted, a ship in distress endeavouring to save himself from shipwreck—s. 17.

assaulting any officer on account of his preserving wreck or a ship in distress—s. 37.

hindering or assaulting with intent to hinder a seaman from performing his occupation—s. 40.

The Post Office (Offences) Act, 1837 (7 Will. *IV & I Vict. c. 36*], *s. 39*, provides that offences punishable under the Post Office Acts committed within the jurisdiction of the Admiralty, are to be tried in the same manner as any other offence within that jurisdiction.

The Wild Birds Protection Act, 1889 (43 & 44 Vict. c. 35], s. 6, provides that offences against the Act within the jurisdiction of the Admiralty are to be deemed of the same nature and liable to the same punishments as if committed on the land, and to be triable as such. The section corresponds with the Admiralty jurisdiction section in the criminal law statutes of 1861.

The Criminal Law Act, 1827 (9 & 8 Vict. c. 28), *s. 12*, provides that all offences prosecuted in the High Court of Admiralty shall be subject to the same punishment, whether of death or otherwise, as if the offences had been committed on land.

The Incitement to Mutiny Act, 1797 (*37 George III c. 70*), appears to be a high sea statute : but the kindred statute passed in the same year, *the Unlawful Oaths Acts, 1797, (37 George III c. 123*), deals with offences " committed as well in the United Kingdom as on the high seas, or out of the realm. " They are therefore included among the statutes which apply beyond the realm.

HIGH SEA JURISDICTION OF COLONIAL COURTS.

12 & 13 Vict. c. 96.

COLONIAL COURTS.

" Admiralty Offences Colonial Act 1849"—*to provide for the prosecution and trial in Her Majesty's Colonies of offences committed within the jurisdiction of the Admiralty*

The preamble, which is repealed by the Statute Law Revision Act 1891, recites the two linked Acts 11 & 12 Will. III, c. 7, and 46 Geo. III c. 54, which provide for the issue of the King's commission for the trial in the Colonies of all offences committed on the sea, or in any haven, river, creek, or place where the

Admiral has power, authority or jurisdiction, and declares that it is expedient to make better provision for the apprehension, custody, and trial in the Colonies of persons charged with the commission of such offences.

Persons charged in Colony with offences at sea triable as if offences committed in Colonial waters.

1.—If any person within any Colony shall be charged with the commission of any treason, piracy, felony, robbery, murder, conspiracy or other offence, of what nature or kind whatsoever, committed upon the sea or in any haven, river, creek, or place the Admiral or Admirals have power, authority, or jurisdiction: or if any person charged with the commission of any such offence upon the sea, or in any such haven, river, creek or place, shall be brought for trial to any Colony, then all persons, officers, and Courts in the Colony shall have the same jurisdiction for trying the offence as they would have had by the law of the Colony if such offence had been committed, and such person had been charged with having committed the same upon any waters within the limits of any such Colony, and within the limits of the local jurisdiction of the Courts of criminal justice in such Colony.

Trial in Colony of murder and manslaughter where death only happens in Colony or at sea.

3.—Where any person shall die in any Colony of any stroke, poisoning, or hurt, such person having been feloniously stricken, poisoned, or hurt upon the sea, or in any haven, river, creek, or place, where the Admiral or Admirals have power, authority, or jurisdiction, or at any place out of such Colony, every offence committed in respect of any such case, whether the same amount to the offence of murder or manslaughter, or being accessory before the fact to murder, or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined and punished in such Colony in the same manner in all respects as if such offence had been wholly committed in that Colony; and if any person in any Colony shall be charged with any such offence as aforesaid in respect of the death of any person who, having been feloniously stricken, poisoned, or otherwise hurt, shall have died of such stroke, poisoning, or hurt upon the sea, or in any haven, river, or place where the Admiral or Admirals have power, authority, or jurisdiction, such offence shall be held for the purpose of this Act to have been wholly committed upon the sea.

The term "Colony" in this Act was extended to include India, by 23 & 24 Vict. c. 28. s. 1.

23 & 24 Vict. c. 122.

"Admiralty Offences, Colonial, Act 1860"—*to enable the Legislatures of Her Majesty's Possessions abroad to make enactments similar to the enactment of the Act 9 George IV c. 31, s. 8.*

Whereas by an Act 9 Geo. IV, c. 31 [*repealed* by 24 & 25 Vict. c.95, s.1], intituled "an Act for consolidating and amending the statutes in England relating to offences against the person", it was enacted (amongst other things) that where any person being feloniously stricken, poisoned, or otherwise hurt upon the sea or at any place in England, should die of such stroke, poisoning, or hurt upon the sea or at any place

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out of England, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory before the fact to murder, or after the fact to murder or manslaughter, might be dealt with, enquired of, tried, determined, and punished in the country or place in England in which such stroke, poisoning, or hurt, should happen, in the same manner in all respects as if such offence had been wholly committed in that country or place : and whereas it may be desirable that provisions similar or analogous to the above-recited provisions should be made with respect to offences committed within Her Majesty's possessions abroad : and whereas doubts are entertained whether it is competent to the Legislature of any such possession to make such provisions :—

Colonial Legislatures empowered to make laws for trial of murder where stroke in Colony and death without, &c.

1.—It shall be lawful for the Legislatures of Her Majesty's possessions abroad to enact by any law or ordinance to be by them made in the usual manner, that where any person feloniously stricken, poisoned, or otherwise hurt, at any place within the limits of such possession, shall die of such stroke, poisoning, or hurt upon the sea, or at any place out of the limits of such possession, every offence committed in respect of any case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory before the fact to murder, or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in the possession within the limits of which such stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been wholly committed within the limits of such possession, or such Legislature may enact by any such law or ordinance to be made as aforesaid, to the like effect..

LEGISLATION DEALING WITH OFFENCES COMMITTED BEYOND THE REALM.

TREASON

We pass now to statutes having a wider area of operation than the high seas.

25 Edward III, st. 5, c. 2.

"Treason Act, 1351"—*A declaration which offences shall be adjuged treason.*

Declaration what offences shall be adjudged treason.

Whereas divers opinions have been before this time in what case treason shall be said, and in what not : the King, at the request of the Lords and Commons, hath made the declaration following, that is to say ; when a man doth compass or imagine the death of our Lord the King or our Lady his Queen, or of their eldest son and heir ; or if a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir ; and if a man do levy war against our said Lord the King in his realm, or be adherent to the enemies of our Lord the King in his realm, giving them aid and comfort, in the realm or elsewhere, and thereof be proveably attainted of open deed by the people of their condition...

35 Henry VIII, c. 2.

"Treason Act"—*an Act concerning the trial of Treasons committed out of the King's Majesty's Dominions.*

For obviating doubts as to the trial of treasons and misprisions of treasons committed abroad.

Forasmuch as some doubts and questions have been moved that certain kinds of treasons, misprisions and concealments of treasons done perpetrated or committed out of the King's Majesty's realm of England, and others His Grace's dominions, cannot ne may by the common laws of this realm be enquired of heard and determined within this his said realm of England: For a plain remedy order and declaration therein to be had and made:—

All manner of offences, being already made and declared, or hereafter to be made and declared by any the laws and statutes of this realm, to be treasons, misprisions of treasons, or concealments of treasons, and done perpetrated or committed, by any person or persons out of this realm of England, shall be from henceforth enquired of heard and determined before the King's Justices of his Bench, for pleas to be holden before himself, by good and lawful men of the same shire where the same Bench shall sit and be kept, or else before such Commissioners, and in such shire of the realm, as shall be assigned by the King's Majesty's commission, and by good and lawful men of the same shire, in like manner and form, to all intents and purposes, as if such treasons misprisions or concealments of treasons had been done perpetrated and committed within the same shire where they shall be so enquired of heard and determined as is aforesaid.

5 & 6 Edward VI, c. 11, s. 4.

"Treason Act, 1551"—*an Act for the punishment of divers Treasons.*

Any treason committed out of the realm may be tried by Commissioners in any shire of the realm.

4. If any of the King's subjects, denizens or other, do commit or practice out the limits of this realm in any outward parts, any the offences which by this Act are made or heretofore now standing in force have been made treason, then such treasons whatsoever they be or wheresoever they shall happen so to be done or committed, shall be enquired and presented by the oaths of twelve good and lawful men, upon good and probable evidence and witness, in such shires and counties of this realm and before such persons as it shall please the King His said Heirs or Successors to appoint by commission under his great seal, in the like manner and form as treasons committed within this realm have been used to be enquired and presented: and upon every indictment and presentment found and made of any such treasons and certified into the King's Bench, like process and other circumstance shall be there made and had against the offenders as if the same treason so presented had been lawfully found to be done and committed within the limits of this realm. And all process of outlawry hereafter to be made within this realm against offenders in treason, being resiant or inhabitant out of the limits of this realm or in any of the parts beyond the sea, at the time of the outlawry pronounced against them, shall be as good and effectual in law to all intents and purposes as if any such offenders had been resident and dwelling within this realm, at the same time of such process awarded and outlawry pronounced.

Process of outlawry against traitors in foreign parts.

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36 George III, c, 7,

TREASON. — "Treason Act, 1795"—*for the safety and preservation of His Majesty's Person and Government against treasonable and seditious practices and attempts.*

Compassing or advising, within the realm or without, death or restraint of the King, to be deemed traitors.

1.—If any person or persons whatsoever after the day of passing of this Act, during the natural life of our Most Gracious Soverign Lord the King (whom Almighty God preserve and bless with a long and prosperous reign) and until the next session of Parliament, after the demise of the Crown, shall within the realm or without, compass, imagine, invent, devise or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint, of the person of our Lord the King, His Heirs and Successors... and such compassings, imaginations, devices or intentions, or any of them, shall express, utter or declare by publishing any printing or writing, or by any overt act or deed : being legally convicted thereof upon the oaths or two lawful and credible witnesses, upon trial or otherwise convicted or attainted by due course of law, then every such person and persons, so as aforesaid offending, shall be deemed, declared and adjudged to be a traitor and traitors, and shall suffer pains of death, and also loss and forfeit as in cases of high treason.

The provisions of this Act which related to the heirs and successors of King George III, Sovereigns of this realm, were made perpetual by the Act *57 George III, c. 6.*

11 & 12 Vict. c. 12.

TREASON FELONY. — "Treason Felony Act, 1848"—*for the better security of the Crown of the United Kingdom.* By this Act all the provisions, which had been made perpetual by the last Act, which do not relate to offences against the person of the Sovereign, were repealed and replaced by other provisions, which are as follows :—

Compassing or advising within the realm or without the deposition of the King, to be felony.

3.—If any person whatsoever after the passing of this Act shall within the United Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose our Most Gracious Lady the Queen, Her Heirs or Successors, from the style, honour, or royal name of the Imperial Crown of the United Kingdom, or any other of Her Majesty's dominions or countries, or to levy war against Her Majesty, Her Heirs Successors, within any part of the United Kingdom, in order by force or constraint to compel Her or Them to change Her or Their measures or counsels, or in order to intimidate or overawe both Houses or either House of Parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom or any other Her Majesty's dominions or countries under the obeisance of Her Majesty, Her Heirs or Successors, and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed, every person so offending shall be guilty of felony, and being convicted thereof shall be liable... to be transported beyond

the seas for the term of his or her natural life... [*omitted words, rep.* S.L.R. Act, 1892.]

TREASON FELONY.

Indictments for felony under this Act are declared to be valid although the facts may amount to treason : but persons tried for felony under the Act are not to be prosecuted for treason on the same facts [s. 7]. Principals in the second degree, and accessories before the fact, are to be punished as principals in the first degree : and accessories after the fact are liable to two years imprisonment [s. 8].

SEDITION.

The Incitement to Mutiny Act, 1797 (37 George III, c. 70), recites that divers wicked and evil disposed persons by the publication of written or printed papers and by malicious and advised speaking, had of late industriously endeavoured to seduce persons serving in His Majesty's forces by sea and land from their duty and allegiance to His Majesty, and to incite them to mutiny and disobedience, and provides that any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in His Majesty's forces by sea or land from his or their duty and allegiance to His Majesty, or to incite or stir up any such person or persons to commit any act of mutiny, or to make or to endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, shall be guilty of felony, and shall suffer death.

The second section provides for the trial at the assizes of the offence when committed on the high seas : and the third section provides that the offence charged may be tried as high treason or as misprision of high treason, but not if there has been an acquittal or conviction under the Act.

The Unlawful Oaths Act, 1797 (37 George III, c. 123), passed the same year, commences with the same recital, adding that the same wicked and evil-disposed persons had endeavoured to give effect to their wicked and traitorous proceedings, by imposing upon the persons whom they attempted to seduce, the pretended obligation of oaths unlawfully administered. It proceeds to enact that any person who administers or causes to be administered, or aids or assists at, or is present at or consenting to, the administering or taking of any oath or engagement, purporting or intended to bind the person taking it to engage in any mutinous or seditious purpose, or to disturb the public peace : or

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to be of any association, society, or confederacy, formed for any such purpose : or to obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader or commander or other person not having authority by law for that purpose : or not to inform or give evidence against any associate, confederate, or other person : or not to reveal or discover any unlawful combination or confederency : or not to reveal or discover any illegal act done or to be done : or not to reveal or discover any illegal act, oath, or engagement, which may have been administered or tendered to or taken by such person, or to or by any other person, or the import of any such oath or engagement, shall be guilty of felony. The punishment under existing laws is seven years penal servitude.

The like penalty is imposed by s. 2 on persons who take any such oath or engagement not being compelled thereto : but compulsion is declared to be no justification unless the person declare the fact and all particulars connected therewith to a Justice of the Peace or to certain other persons in authority, within four days.

Aiders and abettors, though not present at the administering or taking of the oath, are deemed [s. 3] to be principals : and any engagement or obligation in the nature of an oath is deemed [s. 5] to be an oath in whatever form or manner it is administered or taken : and whether it is administered by any person to any other person, or taken without any administration thereof by any other person. There is the same proviso as in the former Act with regard to trial for high treason for the same offence.

The statute applies [s. 6] to offences committed as well in the United Kingdom as " on the high seas, or out of this realm. "

Another " *Unlawful Oaths Act* " was passed in 1812 (52 George III, c. 104), to make more effectual provisions with regard to certain oaths. The oaths specially dealt with were those " to commit any felony, treason, or murder, or any felony punishable by law with death ".

The sections proceed, with some modifications of language, on the same lines as those of second statute of 1777, and so far as they overlap may be supposed to have been intended to repeal the older Act. This specially applies to the declaration of compulsion which may be made within fourteen days instead of four.

Section 7 provides for the trial of offences committed on the high seas or out of the realm.

5 George IV, c. 113. **Chapter II**

SLAVE TRADE.

*The Consolidated Slave Trade Act, 1824.** This Act declares the innumerable offences which constitute "dealing in slaves".

Dealing in slaves on the high seas, piracy.

9.—[*amend.* S. L. R. Act (No. 2), 1888.] If any subject or subjects of His Majesty, or any person or persons residing or being within any of the dominions, forts, settlements, factories, or territories now or hereafter belonging to His Majesty, or being in His Majesty's occupation or possession, or under the government of the United Company of Merchants of England trading to the East Indies, shall, except in such cases as are in and by this Act permitted...upon the high seas, or in any haven, river, creek or place, where the Admiral has jurisdiction, knowingly and wilfully carry away, convey, or remove, or aid, or assist in carrying away, conveying, or removing, any person or persons as a slave or slaves, or for the purpose of his, her or their being imported or brought as a slave or slaves into any island, colony, country, territory or place whatsoever, or for the purpose of his, her, or their being sold, transferred, used or dealt with as a slave or slaves, or shall...except in such cases as are in and by this Act permitted, upon the high seas, or within the jurisdiction aforesaid, knowingly and wilfully ship, embark, receive, detain, or confine, or assist in shipping, embarking, receiving, detaining, or confining, on board any ship, vessel, or boat, any person or persons for the purposes of his, her, or their being carried away, conveyed or removed as a slave or slaves, or for the purpose of his, her or their being imported or brought as a slave or slaves into any island, colony, country, territory or place whatsoever, or for the purpose of his, her, or their being sold, transferred, used, or dealt with as a slave or slaves, then and in every such case the person or persons so offending shall be deemed and adjudged guilty of piracy, felony and robbery...

Persons dealing in slaves or importing slaves &c.

10.—...If any persons shall deal or trade in, purchase, sell, barter, or transfer, or contract for the dealing or trading in, purchase, sale, barter, or transfer of slaves, or persons intended to be dealt with as slaves, or shall, other than as aforesaid, carry away or remove, or contract for the carrying away or removing of slaves or other persons, as or in order to their being dealt with as slaves, or shall import or bring, or contract for the importing or bringing, into any place whatsoever, slaves or other persons, as or in order to their dealt with as slaves;.....the persons so offending...are hereby declared to be felons.

Petty officers, seamen, mariners, and servants who have offended, who give information on oath against owners or masters or officers to British diplomatic and consular officers abroad, within two years, are declared not liable to penalties [s. 40].

6 & 7 Vict. c. 98.

"Slave Trade Act, 1843"—*for the more effectual suppression of the Slave Trade.*

The preamble recites that is expedient that the previous Act 5 Geo. IV, c. 113 should—

be deemed to apply to, and extend to render unlawful, and to prohibit

* The greater part of this Act is repealed by 36 & 37 Vict. c. 88.

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the several acts, matters, and things therein mentioned when committed by British subjects in foreign countries and settlements not belonging to the British Crown, in like manner and to all intents and purposes as if the same were done or committed by such persons within the British dominions, colonies, or settlements ;

and also that further provisions were necessary for the more effectual suppression of the slave trade.

The recited Act and this Act shall apply to all British subjects wherever residing.

1.—All the provisions of the Consolidated Slave Trade Act...and of this Act, shall...be deemed to extend and apply to British subjects wheresoever residing or being, and whether within the dominions of the British Crown or of any foreign country ; and all the several matters and things prohibited by the said Consolidated Slave Trade Act or by this Act, when committed by British subjects, whether within the dominions of the British Crown or in any foreign country, except only as is herein-after excepted, shall be deemed and taken to be offences committed against the said several Acts respectively, and shall be dealt with and punished accordingly...

In case of offences committed against this or the earlier Act, in any places out of the United Kingdom and within any British Colony, evidence may be taken in the Court of the Colony and transmitted to England. [s. 4].

36 & 37 Vict. c. 88.

" Slave Trade Act, 1873 "— *an Act for consolidating with amendments the Acts for carrying into effect Treaties for the more effectual suppression of the Slave Trade, and for other purposes connected with the Slave Trade.*

By s. 2, "foreign State" includes "any foreign nation, people, tribe, sovereign, prince, chief, or head man " : and " vessel of a foreign State ", means a vessel which is justly entitled to claim the protection of the flag of a foreign State, or which would be so entitled if she did not lose such protection by being engaged in the slave trade : and " slave trade ", when used in relation to any particular treaty, does not include anything declared by such treaty not to be comprised in the term or in such treaty.

Visitation and seizure by cruizers, &c., of suspected slave ships.

3.—Where a vessel is, on reasonable grounds, suspected of being engaged in or fitted out for the slave trade, it shall (subject, in the case either of the vessel of a foreign State, or of the commander or officer of a cruiser of a foreign State, to the limitations, restrictions, and regulations, if any, applicable thereto contained in any existing slave trade treaty made with such State) be lawful—

(*a*) If the vessel is a British vessel, or is engaged in the slave trade within British jurisdiction, or is not a vessel of a foreign State, for any commander or officer of any of Her Majesty's ships, for any officer bear-

ing Her Majesty's commission in the army and navy, for any officer of Her Majesty's Customs in the United Kingdom, Channel Islands, or Isle of Man, for the Governor of a British possession, or any person authorised by any such Governor, and for any commander or officer of any cruizer of a foreign State authorised in pursuance of any existing slave trade and treaty ; and

(*b*) If the vessel is the vessel of a foreign State, for any commander or officer of any of Her Majesty's ships, when duly authorised in that behalf, in pursuance of any treaty with that State, and for any commander or officer of any cruizer of that foreign State,

to visit and seize and detain such vessel, and to seize and detain any person found detained or reasonably suspected of having been detained as a slave, for the purpose of the slave trade, on board any such vessel, and to carry away such vessel and person, together with the master and all persons, goods, and effects on board any such vessel, for the purpose of bringing in such vessel, person, goods, and effects for adjudication.

All vessels, slaves, persons, goods, and effects which may be forfeited under the enactments with which this Act is to be construed as one, as herein-after mentioned, may be visited, seized, and detained by any commander, officer, Governor, or person authorized by this section to seize a British vessel.

Vessels equipped for traffic in slaves are to be deemed engaged in the slave trade [s. 4], the section only applying to foreign vessels in so far as consistent with treaty.

By s. 5, jurisdiction is given to all Admiralty Courts in the dominions, in regard to slave vessels, slaves, goods and other matters :—

provided that nothing in this section shall give to any Court any jurisdiction inconsistent with any existing slave trade treaty over a vessel which is shown to such Court to be the vessel of any foreign State, and which has not been engaged within British jurisdiction in the slave trade ; but where any vessel of a foreign State is liable to be condemned by a British Slave Court, such Court shall have the same jurisdiction as if she were a British vessel.

Each of the said Courts shall have the same jurisdiction in regard to any person who has been seized, either at sea or on land, on the ground that he has or is suspected to have been detained as a slave, for the purpose of the slave trade, as the Court would have under this section if he had been so detained on board a vessel that was seized and brought in for adjudication.

Where the seizure has been made by a foreign officer or vessel, proceedings for condemnation are to be taken in the name of His Majesty [s. 6].

By s. 26, offences under either Act are to—

be deemed to have beeen committed either in the place in which the offence was committed, or in the county of Middlesex, or in any place in which the person guilty of the offence may for the time being be, either in Her Majesty's dominions, or in any foreign port or place in which Her Majesty has jurisdiction : and the offence may be described in any indictment as having been committed at the place where it was wholly

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or partly committed, or as having been committed on the high seas or out of Her Majesty's dominions...

SLAVE TRADE.

Where any such offence is commenced at one place and completed at another, the place at which such offence is to be deemed to have been committed shall be either the place where the offence was commenced or the place where the offence was completed.

Where a person being in one place is accessory to or aids or abets in any such offence committed in another place, the place at which such offence is to be deemed to have been committed shall be either the place in which the offence was actually committed or the place where the offender was at the time of his being so accessory, aiding, or abetting.

Power is also taken to remove offenders to another part of the dominions for trial,

By s. 27, slave trade offences are brought within the Extradition Act.

Slave trade jurisdiction is given to mixed Courts and Commissions whose appointment is provided for by treaty. Section 17 grants protection to persons authorised to seize under the Act.

Slave trade jurisdiction is also granted by *the East African Courts Act, 1873 and 1879* (36 & 37 Vict. c. 59), and 42 and 43 Vict. c. 38, to the Vice-Admiralty Court at Aden, and to the East African Courts existing by treaty in Zanzibar and Muscat, or with foreign States in Arabia or on the East Coast of Africa, or the shores of the Persian Gulf, on in any Island lying off Akabia or the East Coast of Africa or the Persian Gulf, including Zanzibar and the Comoro Islands, and with Egypt.

CIVIL SERVANTS.

The Acts dealing with offences by civil servants seem to be limited to the dominions,—*the Offences by Governors Act, 1698* (11 & 12 Will. III, c. 12) expressly : but *the Offences by Public Officers Act, 1802*, (42 George III, c. 85) speaks of offences "committed abroad" ; it applies to persons in the service of the Crown* " in any civil or military office, station or capacity out of Great Britain ", making any offences committed by them in the exercise or under colour of their office triable in England. In addition to the penalty they may declared incapable of serving the Crown " in any station, office or capacity, civil or military, or of holding or exercising any public employment whatsoever ".

The Official Secrets Act, 1899 (52 & 53 Vict. c. 52), which

*The holding of any office under the Crown, whether within or without the dominions is not affected, nor is any fresh appointment rendered necessary, by the demise of the Crown - the Demise of the Crown Act, 1901 [1 Edward VII, c. 5.]

punishes the disclosure of officicial information, the breach of official trust, and the incitement or counselling to commit these offences, is extended [s. 6] to British officers or subjects beyond the dominions.

DOCK-YARDS.

The Dockyards Protection Act, 1772 (12 George III, c. 24), which punishes persons who wilfully set on fire, burn or destroy ships of war or aid or assist in so doing, in any of His Majesty's dockyards or arsenals or any stores therein, provides, by s. 2, for for the trial of offences when committed " in any place out of this realm ". It would seem, however, from the nature of the mischief aimed at, that the operation of the Act is limited to " any of the islands, countries, forts, or places, thereunto belonging ", *i.e.* belonging to the realm, these words being used in the description of the offence.

33 & 34 Vict. c. 90.

FOREIGN ENLISTMENT.

"The Foreign Enlistment Act, 1870"—*to regulate the conduct of His Majesty's subjects during the existence of hostilities between Foreign States with which His Majesty is at peace.*

By s. 4, a British subject, within or without the dominions, without the King's license, accepting or agreeing to accept a commission or engagement in the military or naval service of a foreign State at war with a friendly State: or [s. 5], going on board ship to quit the dominions with intent, commits an offence, which for purposes of trial and punishment is deemed [s. 16] to have been committed either in the place in which the offence was wholly or partly committed, or in the place within the dominions in which the offender may be. It is also, by s. 6, an offence if " any person induces any other person " to quit the dominions under false misrepresentations as to service.

Penalty on fitting out naval or military expeditions without license.

11.—If any person within the limits of Her Majesty's dominions, and without the license of Her Majesty,—

Prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State, the following consequences shall ensue:

(1) Every person engaged in such preparation of fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

(2) All ships, and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to Her Majesty.

Chapter II

46 & 47 Vict. c. 3.

"The Explosives Substances Act, 1883"

EXPLOSIVES.

Causing injury by explosive substances.

3.—Any person who within or (being a subject of Her Majesty) without Her Majesty's dominions unlawfully or maliciously—

(*a*) does any act with intent to cause by an explosive substance, or conspires to cause by an explosive substance, an explosion in the United Kingdom of a nature likely to endanger life or to cause serious injury to property: or (*b*) makes or has in his possession or under his control any explosive substance with intent by means thereof to endanger life, or cause serious injury to property in the United Kingdom, or to enable any other person by means thereof to endanger life or cause serious injury to property in the United Kingdom

shall, whether any explosion does or not take place, and whether any injury to person or property has been actually caused or not, be guilty of felony, and on conviction shall be liable to penal servitude for a term not exceeding twenty years, or to imprisonment with or without hard labour for a term not exceeding two years, and the explosive substance shall be forfeited.

Accessories.

5.—Any person who within or (being a subject of Her Majesty) without Her Majesty's dominions by the supply of or solicitation for money, the providing of premises, the supply of materials, or in any manner whatsoever, procures, counsels, aids, abets, or is accessory to, the commission of any crime under this Act, shall be guilty of felony, and shall be liable to be tried and punished for that crime, as if he had been guilty as a principal.

"Explosive substance" is by s. 9, defined to include any materials for making any explosive substance: and any apparatus, machine, implements, or materials used or intended to be used or adapted for causing or aiding in causing an explosion by an explosive substance, and any part of any such apparatus, machine, or implement.

48 & 49 Vict. c. 49.

CABLES.

"The Submarine Telegraph Act, 1885"—passed to carry into effect an international convention for the protection of submarine telegraph cables, applies in its entirety to the dominions, to all places within the jurisdiction of the Admiral, and to all places where the King has jurisdiction.

By s. 3 (5), a British subject without the dominions, who procures, counsels, aids, abets, or is necessary to the commission of any offence under the section, *i. e.* unlawfully and wilfully*

* "Wilfully", by 50 Vict. c. 3, does not apply to cases of breakage or injury caused accidentally or of necessity in the repair of a cable, when all the precautions have been taken to avoid such breakage or injury. And by the same Act civil responsibility (under s. 4 of the principal Act) is to be determined by the laws of the country in which the case is tried.

or by culpable negligence, breaking or injuring any submarine cable to which the convention applies in such manner as might interrupt or obstruct in whole or in part telegraphic communication, and also attempts to commit, except in the *bonâ fide* attempt to repair another cable, is to be tried and punished as a principal.

Cable-ships interfering with fishing vessels are dealt with by s. 5 (2); and s. 6, gives powers to British and foreign commanders to carry out the convention.

48 & 49 Vict. c. 69.

"The Criminal Law Amendment Act, 1885"—*for the protection of Women and Girls.*

Procuration. **2.**—Any person who—

(1) procures or attempts to procure any girl or woman under 21 years of age, not being a common prostitute, or of known immoral character, to have unlawful carnal connection, either within or without the Queen's dominions, with any other person or persons: or

(2) procures or attempts to procure any woman or girl to become either within or without the Queen's dominions a common prostitute: or

(3) procures or attempts to procure any woman or girl to leave the United Kingdom, with intent that she may become and inmate of a brothel elsewhere: or

(4) procures or attempts to procure any woman or girl to leave her usual place of abode in the United Kingdom (such place not being a brothel) with intent that she may, for the purposes of prostitution, become an inmate of a brothel, within or without the Queen's dominions:

shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding 2 years, with or without hard labour.

Provided that no person shall be convicted of any offence under this section upon the evidence of one witness unless such witness be corroborated in some material particular by evidence implicating the accused.

Procuring defilement of women by threats, or fraud or administering drugs.

3.—Any person who—

(1) by threats or intimidation procures or attempts to procure any woman or girl to have any unlawful carnal connection, either within or without the Queen's dominions; or

(2) by false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connection either within or without the Queen's dominions: or

(3) applies, administers to, or causes to be taken by any women or girl any drug, matter or thing, with intent to stupify or overpower so as thereby to enable any person to have unlawful carnal connection with such woman or girl shall be guilty of a misdemeanor...

the penalty and proviso are the same as in s. 2.

Chapter II

CRIMINAL LAW.

Lastly, there are the express provisions of the Offences against the Person Act, 1861, which deal with murders or manslaughters and bigamy abroad.

24 & 25 Vict. c. 100.

"The Offences against the Person Act, 1861".

Conspiring or soliciting to commit murder with or without dominions.

4.—All persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, and whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person, to murder any other person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanor, and being convicted thereof shall be liable...to be kept in penal servitude for any term not more than ten years...[*omitted words, rep.* S. L. R. Act].

Murder or manslaughter abroad.

9.—Where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed were a subject of Her Majesty or not, every offence committed by any subject of Her Majesty in respect of any such case, whether the same shall amount to the offence of murder or manslaughter, or of being accessory to murder or manslaughter, may be dealt with, enquired of, tried, determined, and punished in any county or place in England or Ireland in which such person shall be apprehended or be in custody, in the same manner in all respects as if such offence had been actually committed in that county or place: Provided, that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland for any murder or manslaughter committed out of England or Ireland, in the same manner as such person might have been tried before the passing of this Act.

Provision for trial of murder and manslaughter where the death or cause of death only happens in England or Ireland.

10.—Where any person being feloniously stricken, poisoned, or otherwise hurt upon the seas, or at any place out of England or Ireland, shall die of such stroke, poisoning, or hurt in England or Ireland, or being feloniously stricken, poisoned, or otherwise hurt at any place in England or Ireland, shall die of such stroke, poisoning, or hurt upon the sea or at any place out of England or Ireland, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or being accessory to murder or manslaughter may be dealt with, inquired of, tried, determined, and punished in the county or place in England or Ireland in which such death, stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been wholly committed in that county or place.

Bigamy: second marriage in England or Ireland or elsewhere.

57.—Whosoever being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding 7 years: and any such offence may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland where the offender shall be ap-

prehended and be in custody, in the same manner in all respects as if the offence had been actually committed in that county or place: provided that nothing in this section shall extend to any second marriage contracted elsewhere than in England or Ireland by any other than a subject of Her Majesty, or to any persons marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person, who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any Court of competent jurisdiction.

57 Geo. III, c. 53.

"The Murders Abroad Act, 1817"—*an Act for the more effectual punishment of Murders and Manslaughters committed in places not within His Majesty's Dominions.*

Whereas grievous murders and manslaughters have been committed at the settlement in the Bay of Honduras in South America, the same being a settlement for certain purposes in the possession and under the protection of His Majesty, by persons residing and being within the said settlement: and the like offences have been committed in the South Pacific Ocean, as well on the high seas as on land, in the islands of New Zealand and Otaheite, and in other islands, countries, and places not within His Majesty's dominions, by the masters and crews of British ships, and other persons who for the most part deserted from or left their ships, and have continued to live and reside amongst the inhabitants of those islands: whereby great violence has been done, and a general scandal and prejudice raised against the name and character of British and other European traders: and whereas such crimes and offences do escape unpunished, by reason of the difficulty of bringing to trial the persons guilty thereof: for remedy whereof:—

Murders and manslaughters committed in certain foreign parts not within His Majesty's dominions, may be tried in any of His Majesty's foreign plantations, in same manner as offences committed on the high seas.

1.—[*amend.* S. L. R. Act, 1873.] All murders and manslaughters committed on land, or within any other lands, countries or places not within His Majesty's dominions, nor subject to any European State or Power, nor within the territory of the United States of America, by the master or crew of any British ship or vessel, or any of them, or by any person sailing in or belonging thereto, or that shall have sailed in or belonged to and have quitted any British ship to live in any of the said islands, countries or places, or either of them, or that shall be there living, shall and may be tried, adjudged, and punished in any of His Majesty's islands, plantations, colonies, dominions, forts or factories, under or by virtue of the King's commission or commissions, which shall have been, or which shall hereafter be issued under and by virtue and in pursuance of the powers and authorities of an Act, 46 Geo. III, c. 54, intituled "an Act for the more speedy trial of offences committed in distant parts upon the sea," in the same manner as if such offence or offences had been committed on the high seas.

† The preamble was repealed by the S. L. R. Act (No. 2), 1890, but it is printed as it will be necessary to refer to it hereafter.

* This Act is the "Offences at Sea Act, 1806": *see* p. 94.

Chapter III.

The Principles on which the Extra-territorial Law of of England is based.

Chapter III

The foregoing enactments, together with the laws referred to in the first chapter, comprise the whole of the general criminal law of England to which an extra-territorial operation has been given, whether on the high seas, or beyond the realm. They must now form the text for a minute examination into the fundamental questions involved in their application. These questions are—

To whom do they apply? Where do they apply? How are they applied?

Nature of questions involved.

Reading the enactments, even cursorily, it must be apparent that the answers to these questions do not lie on the surface: for on no single point is there that uniformity of language from which uniformity of intention might be inferred. With regard to the persons to whom they apply, there is the common form "any person", or "whosoever:" the specific "any British subject": and the more emphatic "any person whatsoever". With regard to the area of application of one group of statutes, we find "the high seas" referred to both separately and in conjunction with "the jurisdiction of the Admiral", this last term also used alone: and with regard to the other group, "out of the realm" alternates with "land beyond the realm". Lastly, as to the method of trial, we find both a series of general procedure statutes investing certain tribunals with jurisdiction to try the offences, and also provisions in some statutes dealing specially with the subject.

The meaning of some of these terms has engaged the attention of the Courts, and an interpretation has been given to them which the light of ancient maxims seems to show to have been the original intention of the legislator. But many points, and some of them not the least important, still remain dark, and variance of opinion on constitutional questions unfortunately exists. To the study of these questions we must now proceed.

THE PERSONS TO WHOM EXTRA-TERRITORIAL LEGISLATION APPLIES. Chapter III

Meaning of "any person" in extra-territorial legislation.

The common formula with which the great majority of criminal enactments commence is "any person", or "whosoever". When used in legislation which is purely territorial, this applies to all persons within the realm, to alien and subject alike; and the first question to determine in connection with extra-territorial legislation is whether this formula preserves its meaning, or whether it is not necessarily contracted in consequence of the nature of that larger area in which the enactment is to operate. In the case of *Mc Leod* v. *A.-G. of New South Wales*, the Judicial Committee discussed these first principles in connection with the crime of bigamy. [L. R. 1891 A. C. 455.]

The "Offences against the Person Act" of New South Wales, makes the second marriage an offence, "wheresoever" it takes place, and the section begins with "whosoever". This pronoun "in its proper meaning comprehends all persons all over the world, natives of whatever country". The question directly involved in the case was whether a Colonial Legislature had power to pass a law with so wide an application. This being decided in the negative, it became— [No. 17 of 1883.]

"necessary to search for limitations, to see what would be the reasonable limitation to apply to words so general: and their Lordships take it that the words "whosoever being married" mean "whosoever being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales.

"It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects: more than any persons who may be within the jurisdiction of the Colony by any means whatsoever: and that, therefore, if that construction were given to the statute it would follow as a necessary result that the statute was *ultra vires* of the Colonial Legislature to pass. Their Lordships are far from suggesting that the Legislature of the Colony did mean to give to themselves so wide a jurisdiction. The more reasonable theory to adopt is that the language was used subject to the well-known and well-considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the Colony."

But the argument, though apparently limited to the jurisdiction of the Colonial Courts, is also based on doctrines of a larger application. The maxims "all crime is local", and "*extra terri-*

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torium jus dicenti impune non paretur", were appealed to, as also Baron Parke's judgment in *Jefferys* v. *Boosey*, as authorities for the principle that—

[4 H. L. Ca. 814.]

"the jurisdiction over the crime belongs to the country where the crime is committed; and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever."

The case, though not an express decision on the corresponding English enactment, warrants certain conclusions with regard to it. There is in s. 57 of 24 & 25 Vict. c. 100, an express provision that it is not apply to second marriages contracted abroad by other than British subjects: but even without this the result of the argument is, that it is bigamy by English law for a foreigner married anywhere to marry again in England: that it would not be bigamy for a foreigner though married in England to marry again abroad: but that it would be bigamy for a British subject though married abroad to marry again abroad,— the marriages in all cases being such as are recognised by English law‡.

[*cf.* p. 114.]

In extra-territorial legislation therefore, as distinct from legislation applicable to British ships, the term "any person" contracts its meaning, and relates only to any British subject.

On the same principle "any ship" will be construed to mean "any British ship". This is the effect of an American decision to be cited presently.

In the case of bigamy the extra-territorial nature of the enactment is clear, as the words of the section expressly contemplate a second marriage "in England or elsewhere"†. But there is of course this previous question in all cases—Is the legislation extra-territorial? More often than not the language of the enactment, as in the case of bigamy, answers the question: but the word "wheresoever" would give rise to the same difficulty as "whosoever". It seems probable that the same limitation by general principle would be applied to it as to the personal pronoun, and it would be held to mean "any place within the realm". The question, so far as the United Kingdom is concerned, is acade-

‡ There is nothing in the section which localises the first marriage, "Whosoever" becomes extra-territorial by the reference to the second marriage; but as the offence is the second marriage there does not seem to be any principle which necessitates a territorial effect being given to the words "being married".

[L.R. 1901, A.C. 446.]

† This was expressly decided in *the trial of Earl Russell*, before the King in Parliament: but the question of the meaning of "or elsewhere" was declared to be "really too plain for argument".

mic, as I do not think this expression is to be found in any English statute : but in connection with colonial legislation the decision of the Judicial Committee is to the effect that "wheresoever" would not suffice to give the Colonial Courts jurisdiction to try offences committed all the world over : but that by reason of the express limitation of the power of Colonies to legislate for their own limits only, it is to be interpreted to mean "wheresoever in the Colony".

Judicial summaries of the law examined.

Passing from the concrete to the general, we frequently come across in the decisions statements, more or less complete, of the principles which govern the subject. It would serve no useful purpose to attempt to collect them : but reference must be specially made to two summaries of the law, or collections of cardinal principles by which to determine whether any given enactment is extra-territorial, and if so whether it is limited to British subjects.

In *R.* v. *Jameson*, the extent of the application of s. 11 of the Foreign Enlistment Act was in question, and Lord Russell C. J. laid down the following principles of construction— [L.R. 1896 2 Q.B. at p. 430.] *cf.* p. 111.

"It may be said generally that the area within which a statute is to operate and the persons against whom it is to operate, are to be gathered from the language and purview of the particular statute. But there may be suggested some general rules : for instance, if there be nothing which points to a contrary intention, the statute will be taken only to apply to the United Kingdom. But whether it be confined in its operation to the United Kingdom, or whether, as the case is here, it be applied to the whole of the Queen's dominions, it will be taken to apply to all persons in the United Kingdom or in the Queen's dominions, as the case may be, including foreigners who during their residence there owe temporary allegiance to Her Majesty. And, according to its context, it may be taken to apply to the Queen's subjects everywhere, whether within the Queen's dominions or without. One other general canon of construction is this— that if any construction otherwise be possible, an Act will not be constructed as applying to foreigners in respect to acts done by them outside the dominions of the Sovereign Power enacting. That is a rule based on international law by which one Sovereign Power is bound to respect the subjects and the rights of all other Sovereign Powers ontside its own territory."

In *Russell* v. *Cambefort*, the propositions laid down by Cotton L. J. were as follow— [L.R. 23 Q.B.D. 526.]

(1) Legislation is always or is presumed to be purely territorial in

its application and operation : all persons within the realm whether subjects or foreigners are bound by it : but no others.

(2) Parliament has the power to extend the operation of a statute to the whole or any part of the Empire : and foreigners as well as subjects within the area of such extension are bound by such legislation.

(3) Parliament has no right to legislate in respect of foreigners who are beyond the limits of the Empire : but,

(4) Parliament has a right to legislate for British subjects who are beyond the limits of the Empire : they ought to obey such legislation in virtue of their allegiance to the British Crown,

(5) If an Act of Parliament should appear to have an extra-territorial application, it is to be construed by the light of the principle that what has been done must coincide with what may be done ; and therefore its operation must be limited to British subjects in other countries in accordance with propositions 3 and 4.

The wide divergence between the ultimate propositions is remarkable, and shows, more than any writing could, both the importance and the difficulty of the question, for Lord Russell admitted the existence of the power of Parliament which Lord Justice Cotton denied.

The weight of Cockburn C. J.'s. authority is in favour of the principle laid down by Lord Russell : it is curious however that he did not note the existence of, and wide divergence between the two doctrines : in fact he cited in support of his own view one authority which was directly opposed to it.

[L. R. 2 Ex. D. at p. 210.] He says, in *R.* v. *Keyn*—

" Where the language of a statute is general and may include foreigners or not, the true canon of construction is to assume that the Legislature has not so enacted as to violate the rights of other nations. In the case of *the* "*le Louis*" where, on an appeal from the sentence of a Vice-Admiralty Court, condemning a French ship for being employed in [2 Dodson, 239.] the slave trade and forcibly resisting the King's cruizers, the application of the Slave Trade Act came into question, Lord Stowell said—

'Neither this British Act of Parliament nor any commission founded on it, can affect the right or interest of foreigners, unless they are founded on principles and impose regulations that are consistent with the law of nations. That is the only law that Great Britain can apply to them : and the generality of any terms employed in an Act of Parliament must be narrowed in construction by a religious adherence thereto.'

This principle was acted on by Vice-Chancellor Wood and by the [1 K & J. 367 ; *on app.* 2 De G. & J. 614.] Lords Justices Knight Bruce and Turner in a case of *Cope* v. *Doherty* where the owners of one foreign ship having sued the owners of another for damage done by a collision at sea, on the defendants seeking to take

advantage of the limitation of liability established by s. 504 of the Merchant Shipping Act, 1854, it was held that however general its terms the enactment did not apply to foreign vessels. Lord Justice Turner says—

> This is a British Act of Parliament, and it is not, I think, to be presumed that the British Parliament could intend to legislate as to the rights and liabilities of foreigners. In order to warrant such a conclusion, I think that either the words of the Act ought to be express, or the context of it very clear.
>
> This being the true rule of construction... "

The two classes of authorities.

The earlier authorities cited by the Lord Chief Justice are typical. They may be divided into two classes—those which maintain the inviolability of the principle that the power of Parliament is limited and cannot be exceeded, and that words must be bent to mean what they do not apparently mean: and those which assert the existence of a general limitation, but admit that it is occasionally exceeded, and, if exceeded, that it must be enforced.

If the "law of nations" can be said to have formulated any principle on the subject, it is certainly hostile to extra-territorial legislation affecting foreigners. Lord Stowell therefore is on the side of Lord Justice Cotton, and in the former class*: Lord Justice Turner is with Lord Russell in the latter.

The adoption of Lord Justice Cotton's rule would land us in a dilemma if it were adopted—If the principle is that Parliament has no right to legislate at all in respect of foreigners abroad, then a limitation to British subjects must be incorporated into all statutes of an extra-territorial nature, the language of which is ambiguous: but where the language is not ambiguous, but expressly includes foreigners abroad, then the Courts must either refuse to enforce the law, because it is *ultra vires* the Parliament and therefore illegal: or else enforce it, declaring at the same time that Parliament has exceeded its power—the difficulty which was said not have been involved in *R.* v. *Anderson*, but which was to be determined when it arose.

Lord Russell's rule probably the true one [L. R. 1 C.C.R. at p. 170.]

The view adopted by Cockburn C. J. and Lord Russell C. J. may, I think, be expressed fully thus - If the intention of Parlia-

*The *dictum* of Blackburn J. in *R.* v. *Anderson* is in the same sense.

"The difficulty as to the statute legislating for those out of the scope of its authority, we must deal with when it arises. As a general rule, no doubt, we should construe a British statute according to the principles of international law, and should confine a legislative enactment to a British subject, or to a person subject to British protection".

If there were any guiding principle of international law there would not be much difficulty in dealing with the subject.

ment is express, as from its words, or very clear from the context, by inevitable implication, the legislation against foreigners must be enforced, when the occasion for doing so arises: and this it is submitted is the sound principle.

A difference in the circumstances which led the two judgments just referred to must be noticed. Cotton L. J. was considering this legislation in its civil aspect: Lord Russell in its criminal aspect. The same rule naturally applies to both forms of legislation, yet the different points of view may well have led to the different propositions: and it is certain that in defiance, as it were, of Lord Justice Cotton's *dictum,* less attention seems to have been paid to fundamental principles in statutes dealing with civil than in those dealing with criminal matters. And there is yet another distinction to be drawn which cannot be without importance. Extra-territorial legislation is of imperfect sanction, not being executable unless and until the offender comes within the jurisdiction. But is clear that in the case of *the "le Louis"*, the statute in question had been interperted as authorising *executive action beyond the realm.* In such circumstances it would be easy to understand the allusions to the respect of the rights of Sovereign Powers which international law requires. That statutes which profess to regulate the conduct of persons within the allegiance of another State, even though the sanction is territorial, do violate the rights of other nations cannot be denied: in a less degree, it is true, but still there can be no essential difference of principle between the two cases; yet it may be that while the former should be rigourously interpreted to the extreme extent of disregarding the statutes, the latter should be subjected to a more elastic rule of interpretation.

Legislation authorising executive action abroad.

The criticism of the decisions which I shall venture to make is limited to this, that the two classes of cases have not been kept distinct, and the *dicta* of the Judges have been applied to both indiscriminately.

But even with regard to the punishment in England of offences committed by foreigners abroad, the recognition of such legislation may, it is submitted, be put on a safer basis. A rule as to what Parliament may do ought not to be based entirely on theoretical considerations, for what Parliament has done is an element not to be lost sight of. If in all the annals of Parliament no trace were to be found of any intention of Parliament to deal

with foreigners for offences committed by them abroad, the rule that it is beyond the power of Parliament so to legislate would at least stand on a sound basis of fact. But suppose the intention occasionally visible : suppose, from the nature of the language used in some cases, the intention clearly expressed : suppose the nature of the offences in these cases to be such that the intention is justifiable as clearly reasonable—are the Courts to fetter the effect of that intention by a rule which is essentially of modern growth ? Suppose that Parliament, for reasons which appeared sufficient at the time, had deliberately enacted that persons who abroad compass and imagine the death of the Sovereign or the subversion of the realm, should be offenders against the law of England, and when they come within the realm should be punished : and suppose, further, that a state of things should befal this country, and cases arise within the meaning of the statute, are the Courts to refuse to enforce it, and so repeal the statute ? The case is an extreme one, but we are considering the extreme rule. In one case at least, the Treason Act of 1795, I think that Parliament has deliberately done what I have treated in a hypothetical manner.

Suggested justification of extra-territorial criminal legislation in extreme cases.

cf. p. 104.

There is, however, another ground on which the extension of some statutes to foreigners abroad may perhaps be justified ; that they are essential to the safety of the State, and as such justified as defensive legislation. For, taking the case of treason, it can hardly be said that the protection of the Sovereign, or of the State itself, can be put on a lower plane of jurisprudence than the protection of the State's revenues, or the health of the Sovereign's subjects. If this be true, then they would be entitled to recognition so long as the details of the legislation stand justified by reason. Extra-territorial criminal legislation must stand on the same footing as the self-defensive legislation already considered, for the rigid rule of construction might well be applied in the case of the Customs laws, and, if applied, would reduce their extra-territorial provisions to a dead letter. It is submitted that the same principles are applicable to both.

Analogy to self-defensive legislation.

cf. p. 57.

From this somewhat inconclusive discusson, one point stands out with great clearness—that the words "any person ", or "whosoever", in spite of their general nature, are not to be construed according to their literal meaning, and are not to be taken as disclosing any intention of Parliament to depart from the nor-

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mal principles of legislation : and when used in an extra-territorial statute, they will be held not refer to any other than British subjects beyond the realm. The intention to include foreigners beyond the realm in the scope of the law must be expressed by some other words conveying that intention more clearly.

At this point unfortunately we stop : for the authorities are negative, and give no hint what the formula is which will convey this intention. When the preliminary examination of general principles is completed it will be necessary to revert to this subject in order to examine the actual language used in the statutes which have been set out in the last chapter, from which perhaps the essential words may be discovered.

THE AREA OVER WHICH EXTRA-TERRITORIAL LEGISLATION APPLIES.

The broad division of extra-territorial legislation into two classes, that which is limited to the high sea, and that which extends generally beyond the realm, gives roughly their respective areas of applications. But there are details, more especially in connection with high sea legislation, which give rise to no little difficulty. The expression the "high seas" has been used for convenience : but there is another usual and common one—"within the jurisdiction of the Admiral", or "of the Admiralty" ; and in the extracts from the different statutes it will be seen that the formula used is very varying, and follows no apparent rule. Occasionally, as in the Criminal Law Consolidation Acts of 1861, "within the jurisdiction of the Admiralty" is used by itself : but more frequently the two expressions are combined, the form being "upon the high seas, or in any haven, river, creek, or place where the Admiral has jurisdiction." We have now to ascertain the meaning of these terms, and whether the use of the different forms implies any variation in the area or extent of the jurisdiction created.

THE JURISDICTION OF THE ADMIRAL.

The statutes of Richard II.

The jurisdiction of the Admiral dates back to time immemorial. In the statute, 13 Rich. II, st. 1, c. 5, it was defined as follows :—

> It is accorded and assented that the Admirals and their deputies shall not meddle from henceforth with anything done within the realm

but only of a thing done upon the sea, as it hath been used in the time of the noble Prince King Edward, grandfather of our Lord the King that now is.

This statute was repealed by 44 & 45 Vict. c 59, s. 3: but the statute of 1391—15 Rich II, c. 3, is still in force. It was passed in consequence of encroachments by the Admirals and their deputies on the jurisdictions of the King and of other lords, cities and boroughs. It declares the jurisdiction of the Admiral's Court not to extend to any matters "rising within the bodies of counties as well by land as by water", nor to wreck of the sea, which were to be determined by the laws of the land.

Nevertheless of the death of a man, and of a maihem done in great ships, being and hovering in the main stream of great rivers, only beneath the [bridges] of the same rivers [nigh] to the sea, and in none other places of the same rivers, the Admiral shall have cognizance: and also to arrest ships in the great flotes for the great voyages of the King and the realm: saving always to the King all manner of forfeitures and profits thereof coming: and he shall have also jurisdiction upon the said flotes, during the said voyages only: saving always to the lords, cities and boroughs their liberties and franchises.

The question of what is called in English "jurisdiction", embraces two distinct orders of thought: first, the area over which the power may be exercised—"jurisdiction" in the proper sense: secondly the subjects or matters put within, or affected by, the exercise of the power—"*compétence*" as used by French lawyers.

Both these points are involved in the consideration of the jurisdiction of the Admiral.

THE LIMITS OF THE ADMIRAL'S JURISDICTION IN HOME WATERS.

Taking the declaration of the law as it is to be found in the statutes of Richard II, there is an express limitation of the Admiral's jurisdiction with regard to part of the dominion waters. Landward it extended, in certain cases, over great ships in great rivers up to the bridges, but no further.

The first point to be determined is in connection with the landward limit: Was the Admiral's jurisdiction in the great rivers exclusive in the cases in which it was applicable, or was it concurrent with the jurisdiction of the territorial Courts?

The concurrent jurisdiction of the common law and the Admiral's Courts.

The limits of the jurisdiction of the territorial Courts was the county, and "the county" ends at low-water mark. But it includes also the "King's Chambers", or embayed waters: and the jurisdiction of the Justices of Assize was coterminous with the limits of the county.

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There is therefore on the face of it a clash of jurisdiction: landward—for the "main stream of great rivers beneath the bridges nigh to the sea" was within the county, and the Justices had cognizance "of the death of a man, and of maihem" done there: the question is whether, when these offences were "done in great ships", the Admiral's jurisdiction ousted that of the Justices. And seaward—for the embayed waters are both beyond low-water mark, and within the county, and where they merge into the high sea is not declared with any certainty: the same question therefore arises, but here with regard to all offences, whether the jurisdiction of the Admiral ousted that of the Justices.

In considering these questions I shall draw largely on the judgment of the Lord Chief Justice in *the Franconia case.*

[L. R. 2 Ex D. at p. 162.]

First as to the meaning of the expression "body of a county."

"From the earliest period of our legal history the cognizance of offences committed on the high seas has been left to the jurisdiction of the Admiral. And the reason is obvious. By the old common law of England every offence was triable in the county only in which it had been committed, as from that county alone the *pais* as it was termed—in other words the jurors by whom the fact was to be ascertained—could come. But only so much of the land of the outer coast as was uncovered by the sea was held to be within the body of the adjoining county. If an offence was committed in a bay, gulf, or estuary, *intra fauces terræ*, the common law could deal with it because the parts of the sea so circumstanced were held to be within the body of the adjacent county or counties: but along the coast on the external sea, the jurisdiction of the common law extended no further than to low-water."

So far as the ordinary coast-line was concerned, the high sea began where the county ended, and at low-water mark the jurisdiction passed from the Justices to the Admiral: the mark being the actual mark according to the state of the tide.†

Passing to the embayed waters, the difficulty of the question may be guaged by the decision in *R.* v. *Cunningham*, as to the extent of these waters in the Bristol Channel.

[28 L. J.: M. C. 66: *cf.* Part I, p. 19.]

In order to determine whether the jurisdiction of the Admiral existed in these waters, we must examine the meaning of the formula—"any haven, river, creek, or place where the Admiral

† The coast is the limit of land jurisdiction. "This limit, however, and its character, varies according to the state of the tide: when the tide is in, and covers the land, it is sea: when the tide is out, it is land as far as low-water mark: between high and low-water mark it must therefore be considered as *divisum imperium*" (Sir John Nicholl—*R.* v. *49 Casks of Brandy*.)

[3 Hagg. Adm. at p. 275.]

has jurisdiction". The method of its use shows that the words are descriptive and not declaratory: and that therefore they can only be construed by reference to the statute of Richard II. So far as description is concerned, the formula gives what was understood to be the extent of the Admiral's jurisdiction at the time the expression became current: but it is doubtful whether their use at the present time imports any definite meaning, so far, at least, as the landward limit is concerned.

Cockburn C. J. points out that there was in old days a usurpation of authority both by the Courts of Law and by the Admiral, and that it was found necessary to restrain both.

" It appears that the Court of King's Bench in dealing with cases occurring below low-water mark, and therefore dehors the limits of any county, was deemed to be exceeding its lawful authority. For Lord Hale informs us that " this jurisdiction of the common law Courts in cases of felonies and treasons and other crimes committed upon the seas, was interrupted by a special order of the King and his Council, in the 35 Edw. III, and by a *supersedeas* issued shortly after ': ' since which ', says Lord Hale, ' I have not observed that the King's Bench or Courts of common law have proceeded criminally in cases of crimes of this nature committed on the high sea. ' The probability is that the exercise of this jurisdiction was looked upon as a usurpation of authority which it was thought necessary to restrain. Certain it is that from that time to this no such jurisdiction has ever been exercised or claimed by the Courts of common law. There cannot possibly be a question that in respect of any offences committed on the sea, out of the body of a county, the jurisdiction was formerly exclusively in the Admiralty, and it is at the present time in the Courts to which the Admiralty jurisdiction has been transferred. Upon this all authorities on criminal law are entirely agreed. [L. R. 2 Ex. D. at p. 166.]

" But if Edward III and his Council were careful to prevent the Courts of common law from encroaching upon the province of the Admiral, it appears from the statutes of Richard II that they were equally so in preventing any usurpation of authority by the Admiral on the domain of the common law.

The learned Chief Justice then refers to the statutes 13 Rich. II, c. 5, and 15 Rich. II, c. 3, which have already been set out. [*cf.* p. 124.] He continues—

" At the same time it was deemed expedient to give the Admiral concurrent jurisdiction with the common law, in respect of murder and mayhem committed in ships at the months of great rivers.

" Upon this footing the criminal law has remained ever since. Whatever of the sea lies within the body of a county is within the jurisdic-

tion of the common law. Whatever does not belonged formerly to that of the Admiralty, and now belongs to the Courts to which the jurisdiction of the Admiral has been transferred by statute : while in the estuaries or mouths of great rivers below the bridges in the matter of murder and mayhem the jurisdiction is concurrent. On the shore of the outer sea the body of the county extends so far as the land is uncovered by water. And so rigorous has been the line of demarcation between the the two jurisdictions, that as regards the shore between high and low-water mark, the jurisdiction has been divided between the Admiralty and the common law according to the state of the tide. Such was the law in the time of Lord Coke : and as regards offences such it is still."

The stress of the argument is as to the limits of the county, which extended to low-water mark : so far as the jurisdiction of the Admiral was concerned in the mouths of great rivers, it encroached upon and was concurrent with, the county jurisdiction, to the extent of its statutory definition. Therefore, we come inevitably to the conclusion that the references to the jurisdiction of the Admiral in " havens, creeks, and harbours ", unless they happen to be at the mouths of great rivers, have no definite meaning : that in so far as they imported an area of jurisdiction other than that on the seaward side of low-water mark in such havens, crecks, and harbours, they refer to a jurisdiction which was wholly imaginary, and that landward the conventional description is inaccurate. In so far even as " inland tidal waters exist in these places, the Lord Chief Justice points out that the Admirals had claimed a jurisdiction over them, and that this was part of the usurpation which was definitely set at rest by the statutes of Richard II.

Meaning of " havens, creeks, and harbours."

[L. R. 2 Ex. D. at p.167.]

There are numerous other references in the judgment to the subject in which the same idea recurs.

[at p. 94.] It is impossible not to be struck by the distinction here taken (in 13 Rich. II, c. 5) between the realm of England and the sea : or, when the two statutes are taken together, not to see that the term " realm " used in the first statute and " bodies of counties ", the term used in the second statute, mean one and the same thing. In these statutes the jurisdiction of the Admiral is restricted to the high seas, and in respect of murder and mayhem to the great rivers below the bridges, while, whatever is within the realm, in other words within the body of a county, is left within the domain of the common law."

[at p. 95.] For centuries, the great landmarks of our judicial system had been set fast—the jurisdiction of the common law over the land and the in-

land waters contained within it, forming together the realm of England, that of the Admiral over English vessels on the seas, the common property or highway of mankind." Chapter III

" I take the true meaning of the term "realm of England" to be the territory to and over which the common law of England extends—in other words all that is within the body of any county—to the exclusion of the high seas, which come under a different jurisdiction only because they are not within any of those territorial divisions, into which, among other things for the administration of the law, the kingdom is parcelled out. At all events I am prepared to abide by the distinction taken in the statutes of Richard II between the realm and the sea. For centuries our judicial system in the administration of the criminal law has been divided into two distinct and independent branches, the one having jurisdiction over the land and any sea considered to be within the land : the other over the sea external to the land. [at p. 197.]

" The law of England knows but of one territory—that which is within the body of a county. All beyond it is the high sea, which is out of the province of the English law as applicable to the shore, and to which that law cannot be extended except by legislation."

So much for the landward side of low-water mark.

Concurrent jurisdiction in embayed waters.

Does this principle of a limited concurrent jurisdiction apply equally to the embayed waters as to the mouths of great rivers? or did the Admiral's jurisdiction revive in its entirety beyond low-water mark in these waters?

In the passage quoted above, from p. 168 of the Chief Justice's judgment, it would appear as if "whatever of the sea lies within the body of a county " was within the exclusive jurisdiction of the common law Courts, and that the concurrent jurisdiction only began in the "estuaries or mouths of great rivers". This does not seem possible, for, so far as the county was concerned, embayed waters did not differ from the mouths of great rivers; and it would therefore seem that here also the jurisdictions must have been concurrent so far as they covered the same offences.‡

But was the Admiral's jurisdiction in these waters limited to murder and mayhem as it was in the mouths of great rivers? The claims of the Admiral over all offences extended up to the rivers ; it therefore included the embayed waters, and the statutes

‡ There are certain passages of Sir John Nicholl's judgment in *R.* v. *49 Casks of Brandy*, which do not appear to support this view, as they refer to the jurisdiction of the Admiralty "to determine all maritimes causes arising wholly upon the sea out of the jurisdiction of a county". The learned Judge did not however examine the question exhaustively, and it is submitted that the statement in the text is sound. [3 Hagg. Adm. at pp. 282, *et seq.*]

of Richard II were passed to settle these claims. Any curtailing of them must therefore be derived from these statutes: and as they were only curtailed in the mouths of great rivers, it follows that there was no curtailment seaward. The presumption seems, therefore, to be that the Admiral's jurisdiction in these waters was the same as it was on the high seas: and that therefore the two jurisdictions were concurrent to the full extent.

THE LIMITS OF THE ADMIRAL'S JURISDICTION IN FOREIGN WATERS.

There was a conflict with regard to the landward limit of the Admiral's jurisdiction so far as the territorial Courts of the United Kingdom were concerned: there is much serious conflict with regard to this landward limit on the other side of the sea: for the definition of the jurisdiction of the Admiral—"that at a place where the tide flows, and below all bridges, the Admiralty assumes to have jurisdiction at common law"—applies not merely to the United Kingdom, but also to all foreign countries whose shores are washed by the sea. The principal authority for this is *R.* v. *Anderson*, in which two earlier cases—*R.* v. *Jemot*, and *R.* v. *Allen*,—were approved, and which was followed in *R.*v. *Carr*. In *R.* v. *Jemot* a crime had been committed on board a British ship, in a natural harbour in Cuba: in *R.* v. *Allen*, also on board a British ship, at some distance up a Chinese river. In *R.*v. *Anderson*, the ship was lying 95 miles up the river Garonne, and below bridges; and in *R.*v. *Carr*, she was moored alongside the quay at Rotterdam. In each of these cases the crime was held to have been committed within the jurisdiction of the Admiralty, and consequently within that of the Central Criminal Court. There are also certain American cases decided in the same sense which were referred to in *R.* v. *Anderson*. Bovill C.J. put the case thus—

[I.R. 1 C.C. R. 161.]

[*cit.* L. R. 10 Q. B. D. at p. 84.]

[1 Mood. C. C. 494.]

[L.R. 10 Q.B.D. 76.]

"If this offence had been committed upon the high seas there could have been no doubt upon the question either on principle or authority, and the offence then would have been committed clearly within the jurisdiction of the Admiralty, and therefore the Central Criminal Court would have stood in the same position as if the offence had been committed within its jurisdiction on land. Then, is the case different because the offence was committed when the vessel was lying in the Bordeaux river, some miles from its mouth, and not in the open sea? The place where the vessel was lying was in a navigable river, in a broad part of it below all bridges, and at a point where the tide ebbs and flows and

where great ships lie and hover. What difference is there between such a place and the high seas? The cases that have been cited clearly show that the Admiralty has jurisdiction in such a place: if so, the case stands precisely the same as if the offence had been committed upon the high seas."

With great respect, the difference is that here is a place within the ambit of a foreign territory: a place where, if the foreign country had a rule of governing the local jurisdiction of its territorial Courts resembling our own, those Courts would have had jurisdiction: or, assuming, as we are entitled to assume, the vessel to have been between the two headlands De Grave and De La Coubre, a place where, if the foreign country viewed the question of embayed waters in the same light as our own Courts do, those local Courts would again have had jurisdiction: a place, in fine where, if the foreign country also had a "jurisdiction of the Admiral" resembling our own, the exercise of British jurisdiction might have produced a conflict between two Admirals.

The converse case to that of the Bristol Channel.

The case is the converse of *R.* v. *Cunningham*, and the mere putting of the facts of the two cases side by side is sufficient to illustrate the difficulty of the question. It is, with deference, beside the point to say, as was said in this case, that the French Courts did not claim to exercise jurisdiction over the vessel under the circumstances; the jurisdiction of the Admiral is asserted absolutely, and with no such qualification as is implied in this statement.

[28 L. J. M. C. 66: *cf.* Part I, p. 15.]

Another point much insisted on was that the claim of jurisdiction by common law was sufficient for the case to rest upon, and that it was unnecessary to rely on the section of the Merchant Shipping Act, which undoubtedly gave the Court jurisdiction. The Court also dwelt on the fact that by relying on the common law, that difficult question as to the effect of extra-territorial legislation was put off until the occasion for discussing it arose.

Question involved in jurisdiction claimed by Admiral in foreign waters.

With deference it could not be thus avoided: for precisely the same question must arise whether it be the common law which extends the jurisdiction of the Admiral into foreign territory, or whether it be a statute. This assumes that the jurisdiction of the Admiral rests on the common law and not on the statute of Richard II, but in reality it makes little difference. There is the claim of an English Court to exercise jurisdiction in respect

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of offences committed in a place which is admitted to be within a foreign country, and it is the consequence of the legislation, rather than the legislation itself, which constitutes the infringement of the rights of the foreign Sovereign. The extent of those consequences may be guaged by the case of Lord Coleridge's Dutchman, who would, he presumed, going on board the ship lying at the quay at Rotterdam, have the protection of the British flag.

[L. R. 10 Q. B. D. at p. 81.]

There can be no doubt that the question raised by s. 687 of the Merchant Shipping Act, claiming jurisdiction in such a case, will, if it is not settled by convention, come for decision sooner or later before the Courts : this has already been suggested in the first chapter : but it must be confessed that the decision in *Anderson's case* does not help much in the solution of the difficult question.

As the matter now stands, however, it must be considered on the authority of these cases, that the area of legislation which professes to deal with the jurisdiction of the Admiral, includes the embayed waters and the great rivers below bridges of foreign countries. But when it professes only to deal with the high seas, it excludes those waters : certainly the great rivers, which none have ever pretended to be high sea : and in all probability also the embayed waters, or " waters of the realm ", of foreign States, if the doctrine with regard to them is asserted. It may be presumed that the doctrine which we ourselves put forward as necessary for the safety of the kingdom, will also be recognised when it is put forward by other nations as essential to their safety.

cf. Part I, p. 17.

This discussion makes the question inevitable whether this vestige of the past, bringing as it does old history down to modern times—taking modern law back to the time when to suggest, as has been suggested above, that there might be a jurisdiction claimed by a foreign country analogous to the jurisdiction of our Admiral, would have provoked a smile—whether this old scrap of antique law might not, quite consistently with the safety of the realm, now give way to the specific treatment of offences on the high seas by statute alone.

THE OFFENCES TRIABLE BY THE ADMIRAL.

We come now to the nature of the offences triable by the Admiral, the competence of his Court. According to the statutes

of Richard II, as we have seen, in the mouths of great rivers it was limited to murder and mayhem : but on the high sea it extended to all offences whatsoever.

This simple statement of the law does not, however, dispose of all difficulty ; for the question arises in connection with the jurisdiction of the Admiral in foreign waters, whether the limitations of the 15 Rich. II extended to these waters : whether that jurisdiction in the mouths of great foreign rivers was limited to murder and mayhem. There was here no conflict between the land and sea Courts to settle : and it may be, that the possibility of conflict between the British and foreign Courts was ignored, and the jurisdiction of the Admiral in foreign waters was left as extensive as it was upon the high sea. This seems to result from the decision in *R.* v. *Carr*, already referred to.

Offences triable by the Admiral in foreign waters.

[L.R. 10 Q.B.D. 76.]

In *R.* v. *Anderson* the crime was murder : the point, therefore, did not arise. But the facts in *R.* v. *Carr* were different. The prisoners were found guilty of receiving certain securities, well knowing them to have been stolen. The theft occurred on board the vessel lying alongside the quay at Rotterdam : and it was assumed throughout that it was necessary to show that the theft occurred within the Admiral's jurisdiction, otherwise the discussion was irrelevant. The ship was in a great river, but the limitation of the Admiral's jurisdiction was not referred to : yet the crime was larceny, not murder or mayhem.

[L.R. 1 C.C.R. 161.]

It is not likely that the Court, proceeding on the ancient jurisdiction of the Admiral, should have ignored its well-known statutory limitation. The question is complicated by the fact that it does not clearly appear from the report, whether the Court followed *Anderson's case* in ignoring the statutory side of the question.

The early Offences at Sea Acts furnish another argument to show that this jurisdiction of the Admiral in foreign rivers was not limited as it was in British rivers. The statute of 28 Henry VIII refers specifically to " treasons felonies robberies murthers and confederacies committed in or upon the sea ": but the 39 Geo. III. c. 37 to " all and every offence and offences committed upon the high seas".

cf. p. 89.

cf. p. 94.

It might appear, at first sight, as if these statutes were passed to transfer to the new tribunal of the Commissioners the jurisdiction of the Admiral such as it existed at the time they were

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passed respectively. But the specific reference to certain offenders in the preamble of the Act of 1536, shows that it was only in respect of these that there had been difficulties in getting an effective trial ; and that it was not till 1799 that it was found necessary to extend the trial by commission to all the offences which had formerly been tried by the Admiral's Court. While, therefore, these statutes do not in any way affect the statement that all offences on the sea were within the jurisdiction of the Admiral, they do, by the absence of reference to the exercise of that jurisdiction in respect of offences committed in foreign rivers, show that the jurisdiction there was the same as it was on the high sea : or, if the statutes of Richard II had limited it, that it was certainly put within the jurisdiction of the Court of the Commissioners. The extent of the jurisdiction of the Admiral originally in foreign rivers has lost much of its importance. The law is settled now by express legislation : and the long deferred question must sometime be decided—whether s. 687 of the Merchant Shipping Act is *ultra vires* the Parliament or not. No such special question arises as to what offences are within that provision : for if it be decided that the section is bad, there are none : if, on the other hand, it is held to be good, then there is no limit, for the section relates to all offences whatsoever. The only question which could possibly arise now, would be whether the trial could be held at the Central Criminal Court. This will be considered in due course when we come to examine the statutes at greater length.

[*see* Appendix to Chapter I.]

Coroners inquests.

Before passing to another branch of the subject it must be noted in illustration of the limit of the territorial jurisdiction, and of the extent of the Admiral's jurisdiction, that the office of coroner of a county could not be executed in respect of matters arising upon the sea, as of a body found thereon : but that " such jurisdiction could only be exercised by a coroner appointed by the Admiral ".

[*per* Cockburn C. J.—L. R. 2 Ex D. at p. 162.]

Civil cases.

The claim of the Admiral to complete jurisdiction on the sea extended to " matters of contract though made on the land, if at all connected with the sea ". This claim it was which led to the phrase in 13 Richard II forbidding the Admiral from henceforth " to meddle " with anything done within the realm ; and "to the declaration in 15 Richard II, that the Court of the Admiral "hath

no manner of connusance power nor jurisdiction of any manner of contract plea quarell or of any other thing done or rising within the bodies of the counties either by land or by water," nor yet with regard to wreck of the sea. So far however as the order of Edward III to the Common Law Courts went, it would seem to have been limited to the trial of crimes: and there is no reason to doubt that so far as civil cases were concerned, as the principle came to be established that the Courts could deal with causes of action arising in foreign countries, it included causes of action arising at sea as well as on land beyond the sea.

"A similar difficulty existed as to wrongs done on the sea, and in respect of which the party wronged was not entitled to redress by civil action, till the anomalous device of a fictitious venue, within the jurisdiction of the common law Courts, and which those Courts did not allow to be disputed, was resorted to, and to the power of trying such actions was assumed." [L. R. 2 Ex. D. at p. 102.]

FOREIGNERS IN FOREIGN SHIPS ON THE HIGH SEAS.

So far we have paid no attention to the nationality of either the ship, or the persons on board.

But Ferdinand Keyn, who stood charged with manslaughter for the negligent navigation of his ship which ran into *the "Strathclyde"* within a marine league from the shore, thus causing the death by drowning of a person on board, was a foreigner in command of a foreign vessel: and the discussion became inevitable whether the jurisdiction of the Admiral extended over such a case. If it did, the Central Criminal Court has jurisdiction in the present day.

A very large, if not the greater part of the Lord Chief Justice's judgment was devoted to demonstrating, by every argument which he could devise, that the Admiral's jurisdiction did not extend over foreigners in foreign ships. The limits of the jurisdiction of the Admiral.

There is a sentence in 15 Richard II which would appear to determine this question in the negative. The jurisdiction beyond the rivers is expressly stated to be over the "flotes of the King and the realm during the great voyages of the King and the realm".

It might conceivably be argued that stress should be laid on the terms "great flotes" and "great voyages", and that therefore the jurisdiction of the Admiral was not universal upon the

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sea even with regard to British ships. But whether the statutes of Richard II are to be taken as exhaustive or not, the use of these words seems to show conclusively that while the Admiral's jurisdiction extended over all persons in the "great flotes", there was not a shadow of pretence that it extended over foreign ships—by express law: though at one period there were some authorities who maintained an assertion of English sovereignty over the narrow seas.

The learned Lord Chief Justice based his argument on an exhaustive analysis of authorities, from which he established these two propositions—

i. The jurisdiction of the Admiral extended over all on board British ships:

ii. The jurisdiction of the Admiral did not extend over foreigners on board foreign ships.

[L. R. 2 Ex. D. at p. 197] "*Ex concessis*, the jurisdiction over foreigners in foreign ships never really existed; at all events, it has long since been dead and buried, even the ghost of it has been laid".

[at p. 203.] "The assent of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law: but it would be powerless to confer without legislation a jurisdiction beyond and unknown to the law, such as that now insisted on, a jurisdiction over foreign ships on a portion of the high seas".

[at p. 229.] "But if it is held to be the high sea, and so within the jurisdiction of the Admiral, the prosecution fails, if the Admiral never had jurisdiction over foreigners in foreign ships, the proof of which totally fails, and the negative of which I think must be considered as established".

With regard to high sea legislation, in so far as it is based on the old jurisdiction of the Admiral, it cannot profess to be of any wider application than that jurisdiction itself; and in so far as it deals with matters lying outside that jurisdiction, it must evidently be interpreted by the same principles as other extra-territorial legislation.

BRITISH SUBJECTS ON THE HIGH SEAS.

There is yet another class of persons whose case has to be examined: British subjects on board foreign ships. The stress of the argument of the Lord Chief Justice was directed to the case before the Court, the position of foreigners on board foreign ships, and he limited himself to the two propositions given above. This further question was only referred to in connection with some

American decisions on the interpretation of Acts of Congress,* the result of which was thus summarized :— Chapter III

" The question was, whether an Act of Congress enacting that ' any person committing the crime of robbery in or upon any ship or vessel on the high seas should be guilty of piracy, ' applied to robbery committed on other than American ships, and it was uniformly held that it did not, even though the offence had been committed by an American citizen ". L. R. 2 Ex D. at p. 172.]

These cases really hold no place in this branch of the Lord Chief Justice's argument, but are only mentioned incidentally : for he was discussing the jurisdiction of the Admiral, and the construction of statutes was only referred to in its relation to this jurisdiction.

There does not appear to be any authority for saying that the Admiral's jurisdiction extended over British subjects on board foreign ships. Admiral's jurisdiction did not extend to subjects on foreign ships.

Such general high sea jurisdiction as may now exist over British subjects depends on the construction of the statutes that create it, and not on derivation from the ancient jurisdiction. But here again we come across a difficulty, for the statutes, in defining the area of the application, do so by reference to " the jurisdiction of the Admiral " ; and this raises the question what this area really was.

It is true that in statutory references, both old and modern, to that jurisdiction, the formula used " within the jurisdiction of the Admiral " would appear to refer to the places where the jurisdiction was exercised, as if it covered everything, ship or person, within that area. But, putting foreign ships out of the question, it is by no means certain that the proper interpretation of this expression is " British ships upon the sea " : for there is still this point to be considered, whether the Admiral's jurisdiction extended generally to British subjects on, or rather, in the sea.

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* Palmer's case (3 Wheat. 510)
U. S. v. Howard (3 Wash. C. C. R. 330)
U. S. v. Klintock (5 Wheat 144)
U. S. v. Kessler (Bald. 15)
U. S. v. Holmes (cited *ib.*).

The facts in the last case would appear to have been the same as those in the *Franconia case*, and the judgment of Mr. Justice Hopkinson seems to have been to the same effect as that of the Lord Chief Justice.

This case is also an authority for the proposition advanced on a previous page that the words " any ship " would receive the same limited construction as " any person " : that is, would be limited to national ships.

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Whether it extended to subjects in the sea examined. [3 Hagg. Adm. at p. 279.] [*ib.* p. 270.]

The judicial duties of the office of Lord High Admiral have been said to include the exercise of "jurisdiction over all matters arising upon the high seas". We know that the Admiral had jurisdiction to appoint a coroner to hold an inquest in the matter of a dead body found at sea, and that the Crown in its office of Admiralty claimed, as droits, all goods found afloat and derelict on the sea: it seems probable, therefore, that the same jurisdiction would have been asserted over an offence committed by a subject in the sea. The civil aspect of this question has already been considered. In dealing with its criminal aspect, it is even more necessary to keep offences *in the sea* distinct from offences *on the sea*, because a very slight stretching of the argument just advanced would bring British subjects on board foreign ships within the jurisdiction of the Admiral. As the old law is stated in the authorities, it is not clear whether the coroner would have held an inquest on the dead body of a foreigner: nor whether the claim of droits of Admiralty would extend to goods found derelict by a foreigner, or which manifestly had formed part of the cargo of some unknown foreign ship. And as to the non-application of the criminal law to British subjects on board foreign ships†, it must not be concluded too readily that this is a matter of course flowing from respect to the foreign flag, for there is the difficult case, to be presently noticed, of an offence committed by a British subject on board a foreign ship on the high sea, not punished, or not discovered, until the offender himself is found on shore. It is therefore of importance to determine what is the exact meaning or the terms used in legislation.

cf. p. 60.

Now in the first place, as the power of Parliament to legislate for British subjects abroad is admitted without question, there can be no doubt as to the power of Parliament to legislate for British subjects on foreign ships on the high seas. Indeed all the statutes which apply to British subjects abroad, and which are couched in general terms, must from their nature extend to British subjects on foreign ships. The question is what words will be held sufficient to indicate the intention of Parliament so to legislate, when there is no intention to legislate for subjects on land beyond the sea.

† That is to say under the Admiralty extension sections of the Criminal Law Acts of 1861, which simply refer to offences committed within the jurisdiction of the Admiralty. The jurisdiction is expressly given (subject to a limitation) by s. 686 of the Merchant Shipping Act, 1894.

Of course a simple statement to that effect would convey this intention: but I believe that the only example of an express reference to subjects on board foreign ships is in s. 686 of the Merchant Shipping Act, 1894, which will be examined presently.

The question therefore is whether there is any other formula which will serve the same purpose. As we have seen, two distinct forms are used—"on the high seas" and "within the jurisdiction of the Admiral". The common alternative form is "on the high seas or within the jurisdiction of the Admiral"; and the question to be determined is whether the use of this alternative does not of itself indicate that a different meaning is to be given to the two expressions.

Unless there was an intention to include a wider area than that covered by the Admiral's jurisdiction, a reference to that jurisdiction would have been sufficient, and no reference to the high seas would have been necessary. But, since the high seas are referred to, the term must have a wider meaning than the "jurisdiction of the Admiral" in its relation to the high seas: and if it has a wider meaning it cannot be other than that the law in which it is used is intended to apply to the high seas generally. Then comes the question of interpretating the formula "any person"; the principle already established shows that it refers only to British subjects, but that it will apply to them anywhere on the high seas, even though they may not be within the jurisdiction of the Admiral: that is to say, on board foreign ships.

Laws referring to the high seas, apply to subjects on foreign ships.

The reference to the "jurisdiction of the Admiral" carries the application of the law into foreign waters. But it would seem that in these waters the law would not apply to British subjects on board foreign ships.

THE APPLICATION OF THE CRIMINAL LAW TO THE HIGH SEA.

We now come to the important question involved in the extension of the general criminal law to the high sea, an enquiry which brings to a practical issue the principles which have been discussed in the preceding divisions of this chapter.

In each of the Criminal Law Acts of 1861—24 & 25 Vict. cc. 96 to 100—there is a section providing that the offences with which the statute deals, "when committed within the jurisdiction of the Admiralty"—the alternative reference to the high

seas being omitted—are to be punished as if committed upon the land, and to the triable as if committed in a county.

Before examining the effect of the section, there is a preliminary point to be considered which arises from the nature of some of the offences which are expressly or impliedly committible on the sea, or beyond. In the Offences against the Person Act, [c. 100], s. 9 deals with murders and manslaughters committed on land out of the United Kingdom: and s. 10 with murders and manslaughters where the stroke has happened "upon the sea", or at any place out of England, and death has occurred in England: or, where the stroke has happened in England, and death has occurred "upon the sea", or at any place out of England. The offence is triable in the county where either the death or the stroke happened, as if it had been wholly committed in that county.

Offences which can only be committed at sea.

It does not seem possible to limit these sections by the Admiralty jurisdiction provision of s. 58. As in each of these sections there is a special provision for trial in the county, it is probable that it is to be looked upon as complete in itself. If this be so, then "the sea" in s. 10 means "the sea" without limitation: and therefore the section applies, in virtue of the construction to be given to "any person", to a hurt given by a British subject anywhere on the high sea, including a foreign vessel upon the high sea. The Admiralty jurisdiction clause would then extend the section to the offence when committed on British ships in foreign waters.

There are two other cases in which "the sea" is expressly used in these statutes. In 24 & 25 Vict. c. 94, s. 7 provides for the trial of accessories to any felony by Courts which have jurisdiction to try the principal felony—

> whether the principal felony shall have been committed on the sea or on the land, or begun on the sea and completed on the land, or begun on the land and completed on the sea, and whether within Her Majesty's dominions or without, or partly within Her Majesty's dominions and partly without.

In 24 & 25 Vict. c. 99—the Coinage Offences Act—the usual section [s. 36] extending the Act to offences committed within the jurisdiction of the Admiralty, contains this addition—"and where any of the crimes and offences...mentioned in this Act shall be committed at sea", and the vessel in which it was committed is registered in, or touches at any part of Scotland, the

Scotch Courts may try it as if it had been committed in Scotland. In both these Acts it is probable that "the sea" would be interpreted as has been suggested in the previous case.

Offences against shipping.

In the Malicious Damage Act [c. 97] we come across a class of offences which require special consideration: those in relation to shipping. Many of these are offences which may be committed on shore or at sea: thus, setting fire to a ship [ss. 42, 43, 44], making a signal or exhibiting a false light [s. 47], injuring a mark intended for the guidance of seamen [s. 48]:—with regard to these there can be no difficulty in the application of the Admiralty jurisdiction section [s. 72], when they are committed on the sea.

But some of those offences could not from their nature occur on shore: thus, casting away a ship [ss. 42, 43, 44], casting adrift or sinking a buoy intended for the purpose of navigation [s. 48], destroying a vessel in distress, not yet stranded or cast ashore [s. 49]. As these offences cannot be committed on shore, or on the shoreward side of low-water mark, but only on the high sea, they seem to be as much offences committed "on the sea" as if those words were used expressly. We therefore come across the same difficulty: is the normal construction of these sections to be limited by the application of the Admiralty jurisdiction section? It is submitted that here, as before, the wider construction must obtain, that these acts when committed by British subjects anywhere upon the sea are offences within the meaning of the statute, and that, as before, they apply to persons on board British ships in foreign waters.

Admiralty extension sections.

The Admiralty extension sections determine the method of trial, but are something more than mere procedure sections. In ordinary cases they are declaratory of offences: repeating, as it were, all the previous sections of the statute, but extending the area of commission. With regard to all other offences dealt with in the Acts, they are punishable only when committed by persons on board British ships, whether on the high sea or in foreign waters. They would also be punishable if committed on the sea.

The text of the Admiralty section in the Offences against the Person Act is as follows:—

24 & 25 Vict. c. 100, s. 58.

Offences committed within the jurisdiction of the Admiralty.

All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place ; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed "on the high seas :" Provided that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.

Offences at Sea Act, 1799.

cf. p. 94.

There are, however, two other sources from which the extension of the general criminal law to the high seas springs. First, there is the Offences at Sea Act, 1799, which provides that all offences committed "upon the high seas" are to be of the same nature as if committed upon the shore, and that they are to be tried by the Court of Commissioners created by 25 Hen. VIII, c. 15,—now by the Central Criminal Court. The question whether this Act is still operative will be considered hereafter ; for the present, as it has not been repealed, we may assume that a jurisdiction is created by it over all offences committed at sea.

M. S. Act, 1894, s. 686.

cf. p. 28.

There is also s. 686 of the Merchant Shipping Act, 1894. This section has already been considered in the first chapter, in connection with offences by British subjects in foreign ports, but must now receive closer attention.

It deals with the following cases—

i—any offence committed by a British subject on board a British ship on the high seas, or in any foreign port or harbour :

ii—any offence committed by a British subject on board a foreign ship to which he does not belong : this without any reference to place, and therefore limited to the high seas :

iii—any offence committed by a person, not being a British subject, on board a British ship on the high seas.

Jurisdiction to try these offences is given to any Court in that part of the dominions where the offender may be found "which would have had cognizance of the offence, if it had been committed on board a British ship within the limits of its ordinary jurisdiction" : or, to put it shortly, on board a British ship in harbour.

The same construction must apply both to this section and to the Act of 1799:—"all offences" includes the whole criminal law of England, and "the high seas" means all the sea over, with a special provision for vessels which leave the high sea and go into a foreign port.

By which law is the criminal law extended to the high seas?

There are difficulties of detail in the application of this section: but we must now deal with the larger question, under which of these three enactments—the Offences at Sea Act, the Admiralty extension sections of the Acts of 1861, or s. 686 of the Merchant Shipping Act, is the general criminal law of the country extended to the high seas?.

Both the Offences at Sea Act, and the section of the Merchant Shipping Act are complete: they cover all legislation of a criminal nature, whether expressed to be applicable to the high seas or not, and are not limited to the jurisdiction of the Admiralty: they apply to British subjects on foreign ships or on the sea, and to subjects and foreigners alike on British ships. Further, s. 686 carries the jurisdiction into foreign ports over British subjects on British ships, and the Admiralty extension sections over British ships. It will thus be seen that the three enactments cover much of the same ground, but that there are special cases which are dealt with by each separately. It will be convenient to put the analysis into tabular form, and for the sake of conciseness to represent the Admiralty extension sections by "*A*"; s. 686 of the Merchant Shipping Act by "*M*": and the Offences at Sea Act by "*O*".

Analysis of the three statutes.

A, *M*, and *O*, each apply to offences committed by subjects and foreigners *on British ships on the high seas*: but

A is limited to offences specially extended, while *M* and *O* include all offences:

A and *O* each apply to offences committed by subjects *on the high sea* itself, but

A is limited to offences specially extended, while *O* includes all offences.

M and *O* each apply to all offences committed by subjects *on foreign ships on the high seas*: but

M is limited to subjects not belonging to the ship, while

O includes all subjects.

A and *M* each apply to offences committed on *British ships in foreign waters* : but

M is limited to ports and harbours, while *A* extends to all the dominion waters, and to great rivers up to the bridges : again

M is limited to British subjects, while *A* includes subjects and foreigners : but

A is limited to offences specially extended, while *M* includes all offences.

This reduces to its elements the problem of construction which the Court had before it in the case so often referred to, *R.* v. *Anderson*.

[L.R. 1 C.C.R. 161 : *cf.* p. 8.]

The analysis brings to light a problem as difficult of solution as it is curious. Why have these three enactments been allowed to remain on the statute-book ? The question put in practical form is, Can a prosecution take place under either of the provisions applicable to any given offence ? The question of implied repeal is a difficult one ; but, under ordinary circumstances, if there were three successive enactments dealing with the same subject, it might fairly be argued that the law was to be found in the last one. It might, however, be urged in the present case, that the Merchant Shipping Act of 1854 first, and the Admiralty extension sections in 1861, each dealt with some point which the legislation at the time had omitted, and that in providing for it, the broad general principle was repeated. The subject is further complicated by the reproduction of the provisions of 1854 in 1894.

The mutual relation of the three statutes.

The question is a peculiarly difficult one so far as British subjects on board foreign ships are concerned, for s. 686 deals with them only when they are " on board a foreign ship *to which they do not belong* " : from which it follows, that British subjects on board foreign vessels *to which they do belong* are not within the purview of the section. The question then definitely arises, whether the negative provision of the Merchant Shipping Act over-rides the general provision of the Offences at Sea Act.

cf. p. 28.

The question in its converse aspect is not an unfamiliar one. By s. 687 of the Merchant Shipping Act, very wide powers of jurisdiction are taken with regard to offences by British seamen " either ashore or afloat out of the dominions ", the trial being by the same Courts as would have had jurisdiction if the

offences had been committed within the jurisdiction of the Admiralty. Although extra-territorial, this jurisdiction is so much a part of the universal law of merchant ships that no exception is taken to it, even though it is applied to foreigners; the difficulties which arise are difficulties incidental to concurrent jurisdiction. This must be taken, however, subject to the special question to which attention has been called, that the jurisdiction is extended to seamen who within three months previously have been on board a British ship, and apparently who have left it.

But the question which arises under s. 686, is a more complicated one. It appears to amount to a statutory recognition of the principle of merchant shipping law, and an express renunciation of British jurisdiction over subjects serving on foreign ships, which would prevent any question of concurrent jurisdiction arising. This would be tantamount to saying that taking service on board a foreign vessel is equivalent to expatriation during the continuance of the service. It is difficult to find any authority for such a proposition: its existence, however, seems to depend on the question of implied repeal above referred to.

cf. p. 28.

Jurisdiction over seamen three months after they have left the vessel.

Dealing only with the construction of s. 686, other difficulties arise which are not easy to solve.

Take the case of British subject, a sailor on a foreign ship, in a foreign harbour, who leaves his ship and commits an offence on shore, or on board another foreign ship to which he does not belong. Would he fall under the first part of the section as a British subject charged with an offence in a foreign port, or would it be held that, as he belonged to a foreign ship, he did not fall within the section at all?

If this surrender of jurisdiction is in fact intended by this section, a still more serious case can be put, which emphasises the difficulties which surround the subject. Acts committed by British subjects serving on foreign ships which are offences by English law, but not by the law of the ship's flag, would go unpunished; and further, offences committed on board but not discovered until after (*query*, three months after) the offender had left the ship would go unpunished: under the section, because *ex concessis* it does not apply: by foreign law, so long as he chose to remain out of the foreign country, for extradition would not be applicable to such a case.

But the case would fall within the Admiralty jurisdiction

sections : so that here again we have the same problem as before, does the negative provision of the Merchant Shipping Act override the general provision of the Act of 1861 ?

The question twice stated in a special form may now be put in its final shape : Is the application of the general criminal law now governed solely by s. 686 of the Merchant Shipping Act ? The answer cannot be given until the Courts have decided it.

THE TRIAL OF EXTRA-TERRITORIAL OFFENCES.

We come now to the practical question how and where these extra-territorial offences are to be tried. As we have seen, the declaration of the offence and the creation of the jurisdiction to try it are, as often as not, treated together in the same section : and, as in the case of the offence, so here in the case of the jurisdiction, there is no consistent use of any regular form of words : a further analysis of the sections is therefore necessary.

It is in the first place essential to bear in mind the starting point of this branch of the subject. The civil Court had no inherent jurisdiction at all over these offences : and the Court of the Admiral had only the sea jurisdiction with which we are now familiar. For any jurisdiction which may exist for the trial of offences committed beyond the realm we must look to the statutes which either create a special jurisdiction, or transfer the jurisdiction of the Admiral.

It is necessary first to glance briefly at the procedure by way of outlawry, which differed essentially from trial, by which is implied the presence of the person accused within the realm, and legally brought before the Court.

Modern law as to outlawry.

cf. p. 103.

Outlawry is not dead, though it has slumbered since 1859. The Treason Act of 1551 expressly provides in s. 4, for process of outlawry against offenders in treason, " King's subjects, denizens or other " resiant or inhabitant " out of the limits of this realm or in any the parts beyond the sea ". So also s. 3 of the Treason Act of 1695, for regulating trials for treason and misprision of treason—preserved the process of outlawry conjointly with the new procedure it introduced. It is recognised again in the Forfeitures Act, 1870, and in the Juries Act 1870. The procedure is settled by rules 99 to 121 of the Crown Office Rules, 1886 : and, finally, it was again recognised by the Statute Law Revision

7 & 8 Will. III, c. 3.

33 & 34 Vict. c. 23.

34 & 34 Vict. c. 77.

Act, 1888, by s. 1 (2) of which the Lord Chancellor was empower- Chapter III
ed to—

extend the Crown Office Rules in force for the time being as to proceedings in outlawry to proceedings in outlawry in Courts of Assize, over and terminer, and gaol delivery, and in other Courts in England with such modifications (if any) as to him may seem expedient. 51 & 52 Vict. c. 3.

From the date of the order so made the enactments dealing with outlawry in the 3rd schedule to the Act will be repealed in so far as they are still applicable to the Courts in question.*

Outlawry, on the face of it, seems to have been a procedure for the trial of persons who had put themselves without the law, that is to say (so far as the subject concerns us), who had gone out of the jurisdiction, giving them an opportunity to come within it to traverse the enquiry and take their trial: failing which, forfeiture.

It was expressly extended by the Treason Act of 1551, cf. p. 103 to treasons by British subjects abroad; but, apart from this, there does not seem to be any warrant for assuming that the process could be resorted to for an offence under an extra-territorial statute: and clearly the process could not be applied to a foreigner, even in the case of treason, under like conditions. But let us Outlawry of foreigners. assume the case of a foreigner who has committed an offence within the realm: could it be applied to him? If he has property in England, it might be an effective means of compelling him to return to take his trial. Whether this would be an exercise of jurisdiction against a foreigner contrary to international law, or whether it would be no more than the exercise of a power created against him by reason of his having come within the ligeance, and there committed an offence against the law, is the problem which the Courts would be called upon to solve.

In this connection, it is interesting historically to refer to the antiquated procedure before the Court of Chivalry, which appears to have received judicial recognition. Treason on land abroad was triable before the Court of the Constable and Marshall, or Court of Chivalry, when the person charged offered to clear himself by combat: in which case "the trial might be by an appeal of treason upon which the combat might be joined". A note by Mr. Justice Whitlock on the subject is given in the re- The Court of the Constable and Marshall.

* In writing these paragraphs the Author has largely availed himself of the information given on the subject of "Outlawry" in the New Encyclopædia of the Laws of England.

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port of the trial of Lord Rea, in which he says, the Judges having been consulted—

"We were of opinion that this proceeding before the Constable and Marshall was at it was before the statute of the 35 Henry VIII, cap. 2, and that statute devised a way how to try these foreign treasons in England, but did not take away the other. We were also of opinion that that the statute of I Mary, cap. 10,* did not take it away nor intend it".

It is to be noticed that the jurisdiction of the Court of the Constable and Marshall was defined by the statute 13 Rich. II c. 1., which remained upon the Statute book till 1881, when it was repealed, together with many other ancient enactments, by 44 & 45 Vict. c. 59, s. 3.

Putting outlawry on one side, the statement holds good that for breaches of these extra-territorial laws the trial must be deferred until the offender is within the jurisdiction. Nor can it, except in the case of high sea offences, be expedited by means of extradition, which has supplanted outlawry. When however the offender has come within the jurisdiction, there are certain enactments which deal with the trial and the procedure in connection with the trial which we must now proceed to consider.

Offences beyond the realm not triable unless jurisdiction specially created.

It is not sufficient merely that an act should be committed on the sea or abroad, which would have been an offence if committed on the land, and that the person who has committed the act should afterwards come within the kingdom, for the Courts to have jurisdiction to try it. The territoriality of statutes, and the territorial limits of the jurisdiction of the Courts, combine to make extra-territorial offences untriable, unless, like the offences themselves, the jurisdiction to try is specially created. The Admiral's Court was the special tribunal with extra-territorial powers to try offences on the high sea within its jurisdiction. There was no other; and, therefore, the starting point of the enquiry must be the time when that jurisdiction began to be encroached upon. We must trace the gradual disappearance of that jurisdiction and of the Court which exercised it, and the gradual evolution of the jurisdiction of the territorial Courts to deal with offences on the high sea, and beyond. This will necessarily involve occasional repetitions of what has been said in

* The statute referred to is 1 & 2 Ph. & M. c. 10, which provided that all trials for treasons should be according to the common law: and that concealment of treason should be misprision of treason only.

previous pages; they will, however, be condensed as much as possible. Chapter III

The jurisdiction of the Admiral was first encroached upon by 28 Henry VIII, c. 15, which created a new jurisdiction for the trial within the realm of certain offences committed on the sea: that of the King's Commissioners, who were to be the Admiral or his lieutenant, and three or four "substantial persons" named by the Lord Chancellor. *cf.* p.89.

The creation of a territorial Court with jurisdiction over high sea offences.

The meaning of this statute was thus explained by Cockburn C. J. in *R.* v. *Keyn.* [L.R. 2 Ex. D. at p.169.]

"Though by 28 Hen. VIII, c. 15, the trial of offences previously within the jurisdiction of the Admiral was transferred to Commissioners to be appointed by commission from the King, under which the trial was to be held in such county as the commission should direct, and 'according to the common course of the laws of the realm, used for such offences when done upon the land within the realm,' it is I think beyond dispute that all that was effected by this statute or by those that succeeded it, as regards jurisdiction was a transfer of the criminal jurisdiction of the Admiral, such at it was, to Courts proceeding according to the ordinary procedure of the common law—not an extension of it. The statute created no new offence, effected no extension of jurisdiction. It simply transferred the jurisdiction of the Admiral *talem qualem*, to the Common Law Courts. As to this the received authorities are entirely agreed".

and again

"The statute must receive a reasonable construction, and the construction put upon it by the highest authorities has always been that all that it effected or was intended to effect, was as I have already stated a transfer of jurisdiction only." [at p. 209.]

Then follow references to Coke's Institutes, to Comyn's Digest, and to Hawkins' Pleas of the Crown, the effect of them all being that "this statute altered not the nature of the offence, but only the manner of trial".

The following points must be noted in connection with this statute:—First: the Lord Chief Justice seems to infer that the whole of the Admiral's jurisdiction was transferred to the new Court of the Admiral and Commissioners, and that thenceforward this new tribunal replaced the old one. It has already been pointed out that only certain specified offences were put within the new jurisdiction, and that there were others, dealt with subsequently, which still remained within the Admiral's jurisdiction.

Secondly : that the Admiral ceased to have any jurisdiction even over these specified offences is a matter of inference : no transfer is mentioned, and the statute seems rather to have aimed at creating a land jurisdiction concurrent, in the case of the offences specified, with that of the Admiral.

The creation of a territorial Court with jurisdiction over high sea offences.

Thirdly : we have the alternative description of the place of the offence—"committed in or upon the sea, or in any other haven river creek or place where the Admiral or Admirals have or pretend to have power authority or jurisdiction". This allusion to a jurisdiction which was being transferred as if it were still existing, seems to show that no transfer was in fact contemplated, but merely the creation of a new jurisdiction for the trial of offences which were still within the old jurisdiction. By the Act the Commissioners' Court was given jurisdiction on the high sea over British ships† in respect of the specified offences, and also over British ships within the waters of foreign States up to the bridges.

Fourthly : there is a variance in the language used in the formula from its usual form : it runs " in or upon the sea or in any *other* haven &c." The effect of this word *other* may be to link the jurisdiction of the Admiral on to the sea as well as to " havens or places " : in which case the jurisdiction given to the Commissioners corresponded with the jurisdiction of the Admiral, and would not have applied to the specified offences when committed by British subjects on foreign ships.

The statement that " the statute created no new offence, created no extension of jurisdiction", seems to depend on this consideration. For, at that time there was no jurisdiction over subjects in foreign ships ; and the creation of this jurisdiction cannot be attributed to this Act, unless it can be interpreted as dealing with the offences committed on the sea as distinct from their commission within the Admiral's jurisdiction.

The specific enactment of s. 4, with regard to the taking of things from any ship which can conveniently spare them, and paying for them, does in fact create a new offence. But the point is not of much importance.

c f. p. 90.

The *Piracy Act, 1698*, enlarged the definition of piracy : and by s. 2 extended the trial by Commissioners to the American

† For the sake of brevity the jurisdiction over British subjects in the sea, which has been sufficiently discussed, will not be referred to again in the following pages. It is understood that it forms part of the Admiral's jurisdiction on the high seas.

Colonies. The Act calls for no special comment: but the preamble, after referring to the passing of the Act of Henry VIII, continues—"whereupon the trial of these offenders before the Admiral, or his lieutenant, or his commissary, hath been altogether disused"—which bears out the suggestion made above, that the former statute did not transfer, but created a new jurisdiction, concurrent as to the specified offences with the existing one, which, by its greater convenience, caused the Admiral's Court to fall into desuetude.

The creation of a territorial Court with jurisdiction over high sea offences.

The *Offences at Sea Act, 1799*, extended the jurisdiction of the Commissioners, by enacting that all offences committed upon the high seas should be tried in like manner as the offences dealt with under the statute of Henry VIII.

cf. p. 94.

This Act shows conclusively that the Commissioners had not, up to that time, been vested with the whole of the Admiral's jurisdiction: so that, even had a transfer of jurisdiction been effected by the earlier Act, it was only partial.

In s. 1 the offences referred to are those "committed upon the high seas:" there is no reference to the jurisdiction of the Admiral. It would therefore seem that the statute put within the jurisdiction of the Commissioners all offences committed not only by persons on board British ships, but also by British subjects on foreign ships. If this be true, we have here the creation of a general jurisdiction over offences by subjects on foreign ships. It did not, however, touch the question of offences on British ships in foreign waters.

By the *Offences at Sea Act, 1806*, an extension was made to the Colonies generally of the provisions of the Act of 1799, similar to that made by 11 & 12 Will. III, c. 7, of the provisions of the Act of 1536 to the American Colonies. The difficulty of the subject is well illustrated by the fact that in this Act the alternative formula is again resorted to: it deals with all offences when committed upon the sea or within the jurisdiction of the Admiral. The result of this must have been, that the Colonial Commissioners had a larger jurisdiction in the matter of offences committed in foreign waters than the Commissioners in the United Kingdom.

cf. p. 94.

The creation of a territorial Court with jurisdiction over high sea offences.

These are the statutes which created the first territorial Court with jurisdiction over high-sea offences.*

* Cockburn, C.J., only refers to the statute of Henry VIII. The quotations in

Then came the *Admiralty Offences Act, 1826*, which provided that any of the Commissioners named in the commission of oyer and terminer for the trying of offences committed within the jurisdiction of the Admiralty, and also any of the Commissioners under 46 Geo. III, c. 54, should take depositions of witnesses "touching any treason, piracy, felony, robbery, murder, conspiracy, or other offence of what nature or kind soever" committed upon the sea or in any haven, etc.,† where the Admiral has jurisdiction.

cf. p. 95.

†[Note that it is "the sea or any haven," and not "the sea or any other haven": *cf.* p. 150.]

The object of this Act is clear—to provide for the taking of depositions of witnesses in relation to all offences made triable by the earlier statutes—but the reading of it is somewhat obscure owing to the incompleteness of the drafting.

The depositions are to be taken touching treasons, etc., and all other offences committed upon the sea or within the jurisdiction of the Admiral. This includes offences committed on the sea but not within the Admiral's jurisdiction, and also offences committed within the Admiral's jurisdiction but not upon the high sea.

The Commissioners empowered to take depositions.

The Commissioners are twofold. First, those named for the trying of offences committed within the jurisdiction of the Admiralty. This must include Commissioners under the statute of Henry VIII, and also under the *Offences at Sea Act, 1799;* for the "other offences" made triable by this Act were committible within the Admiral's jurisdiction. But it also contemplated their being committed beyond the Admiral's jurisdiction. The Court of Commissioners was, however, the same in both cases, and the more accurate designation would have been "the Commissioners named for the trying of offences committed upon the sea or within the jurisdiction of the Admiralty." The error is one of description only, and cannot affect the scope of the statute. Secondly, the Commissioners named under the *Offences at Sea Act, 1806:*† *i.e.* the Colonial Court of Commissioners, which had jurisdiction over all offences committed at sea as well as within the jurisdiction of the Admiral.

[*cf.* p. 151.]

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the judgment from Lord Coke, Comyns and Hawkins referred specifically to this statute, and to no other.

† Any reference to the earlier Colonial Act of 1799 was obviously unnecessary, for s. 14 of that Act must be considered as absorbed in the Act of 1806.

This Act of 1826 dealt only with the machinery of the trial by Commissioners; and cannot be held to have created any new jurisdiction. It is now replaced by the Acts which deal with the taking of evidence for the modern Courts. *cf.* p. 56.

It will be noticed that the Admiral is still referred to as *having* power and jurisdiction: which would seem to show that, even at this time, the Admiral's Court was still in existence, though more than ever in a state of decay.

Next in order comes the *Central Criminal Court Act, 1834*, 4 & 5 Will. IV, c. 36. which, by s. 22, gives jurisdiction to that Court to try offences committed on the high seas, and in other places within the jurisdiction of the Admiralty of England. The Admiralty is here used for the first time, and it may be taken as a sign that the Court of the Admiral had at length disappeared; the jurisdiction of the King in his office of Admiralty being thenceforward exercised by other Courts, among which, as will be seen from the next Act referred to, was the Court of the Commissioners.

Jurisdiction of the Central Criminal Court.

We have now reached a point in the enquiry which deals with a Court existing at the present day, and whose jurisdiction in respect of extra-territorial offences remains such as it was created in 1834; the meaning of the language used, and the accurate application of what had previously been done become, therefore, eminently practical questions. The offences triable by the Court are those "committed on the high seas and other places within the jurisdiction of the Admiralty"; and further on they are alluded to as offences "committed upon the high seas aforesaid within the jurisdiction of the Admiralty". The word *other* is again used; but the second description of the offences seems in this case to leave no doubt as to its meaning. Those only were declared triable which were formerly within the jurisdiction of the Admiral, whether on the high seas or in foreign waters. It is doubtful, therefore, whether the jurisdiction of the Central Criminal Court would extend to offences by British subjects on foreign ships.

So far as the Admiral's jurisdiction in home waters is concerned, the Central Criminal Court would have jurisdiction over all offences, except in the rivers below bridges, when it would be limited to murder and mayhem.

Lastly comes the *Admiralty Offences Act, 1844*, which gives to the Justices of Assize the powers which, by any Act, are given *cf.* p. 95.

Chapter III

Jurisdiction of the Court of Assize.

to the Commissioners named in any commission of oyer and terminer for the trying of offences committed within the jurisdiction of the Admiralty. The necessity for a commission is done away with, but the procedure by way of commission is preserved: and the jurisdiction of the Central Criminal Court is declared not to be interfered with.

Here no difficulties of construction arise: for although the preamble only recites the Act of Henry VIII, and declares that "it is expedient that provision be made for the trial of persons charged with offences so committed within the jurisdiction of the Admiralty", the powers given to the Justices of Assize, are those given to the Commissioners "under any Act", making it lawful for them to try "all offences alleged to have been committed on the high seas and other places within the jurisdiction of the Admiralty". The Offences at Sea Act, 1799, is thus specifically referred to, and the jurisdiction extends to "all offences". The use of the word *other* between "the high seas" and "places within the jurisdiction of the Admiralty", corresponds with its use in the Central Criminal Court Act, 1824. In the result, therefore, this Act must be held to refer to the jurisdiction of the Act of 1799, in so far as the area of its application corresponds with that of the Act of Henry VIII, but does not extend to offences by British subjects on foreign ships. The jurisdiction of the Assize Court, therefore, does not differ in any way from that of the Central Criminal Court.

Warrants of arrest.

cf. p. 96.

The legislation dealing with the trial of offences abroad is completed by two statutes which provide the machinery for putting the jurisdiction in force. The issue of the warrant of arrest depends on s. 2 of the *Indictable Offences Act, 1848*. In this section there is a reversion to the alternative formula, the description of the Admiralty jurisdiction being given in its most ancient form —on the high seas or in any creek &c., where the Admiralty have or claim to have jurisdiction. The high seas are not linked on to the creeks by the word *other*.

There can be little doubt that the purview of this part of the section cannot be less than that of the statutes which it is intended to render operative: and that, therefore, the cases in which a warrant may be issued are all offences which fall within the previous statutes. This of course is independent of

the question of the Court which has jurisdiction, or which may thereafter have been given jurisdiction, to try the offences.

The addition of the "claim to jurisdiction" has little if any meaning. In this connection however it must be noted that with regard to the variation "where the Admiral pretends to have jurisdiction" Cockburn C. J. said that it had been construed to mean "rightfully assert". The cases in which this construction had been put upon these words were not however given. [L. R. 2 Ex. D. at p. 209.]

Form of the warrant.

The form of the warrant given in the schedule to this Act, however, re-introduces confusion. It does link the high seas on to the jurisdiction of the Admiralty, thus — "on the high seas out of the body of any county of this realm *and* within the jurisdiction of the Admiralty of England", making it correspond with the jurisdiction of the Central Criminal Court and Court of Assizes. The form of the schedule may probably be corrected to coincide with the section to which it is an adjunct, otherwise there would be no power to issue warrants in the case of offences committed by British subjects on foreign ships. Yet the section goes further than the high seas, and allows the issue of warrants "in all cases of crimes or offences committed on land beyond the sea, for which an indictment may be legally preferred in any place in England or Wales". The form of the warrant in this case describes the offence to have been committed "on land out of the United Kingdom, to wit, at ".

Depositions of witnesses.

Lastly, with regard to the depositions of the witnesses of the accused, s. 2 of the *Criminal Law Amendment Act, 1867*, allows them to be taken by Justices of the Peace in all cases of indictable offences, "whether committed within this realm, or upon the high seas, or upon land beyond the sea". Here again all cases are expressly provided for; the term "high seas" is used without restriction, and there is no reference to the jurisdiction of the Admiral. The only difficulty arises in connection with the offences in foreign waters which were within that jurisdiction. It may possibly be met by construing the word "land" to mean "territory", when it would refer not only to foreign territory but also to waters included within that territory. *cf.* p. 96.

These two statutes are specially interesting at this stage of the enquiry, from the fact that they indicate clearly that trials of offences beyond the realm are contemplated, and that therefore

Chapter III

the jurisdiction for the trials themselves must somewhere be provided for. The solution of this question must wait until the sections creating the offences are more fully examined.

General summary.

The statement of the facts has occupied much space, has involved innumerable references to the same Acts, and many repetitions of the same phrases; we must now endeavour to disentangle the threads, and to summarise the conclusions arrived at, in order to answer the question how far the analysis of the three statutes given on a preceding page is accurate. Confining ourselves for the present to the jurisdiction of the Commissioners under the Act of Henry VIII and the Offences at Sea Act, 1799, we find that they both cover a certain common ground—the commission of the specified offences within the jurisdiction of the Admiral on the high seas. The Act of 1799 added to the jurisdiction all other offences within that jurisdiction on the high seas. The Acts which create the respective jurisdictions of the Central Criminal Courts and the Assize Courts, apply to this common ground. But there is, so to speak, a remnant of jurisdiction under each of these Acts, which is not covered by the other: over the specified offences on British ships in foreign waters, under the Act of Henry VIII: over all offences by British subjects on foreign ships on the high seas, under the Act of George III. The first class are put within the jurisdiction of the modern Courts, because the Acts relate to the jurisdiction of the Admiralty: and the jurisdiction is not limited to the specified offences in foreign waters as that of the Commissioners was, because the Acts relate to "all offences". It is doubtful whether the second class are put within the jurisdiction, because the use of the word *other* shows that when "high seas" is used in the Acts, it means only the Admiral's jurisdiction on the high seas. It follows, therefore, that neither the Central Criminal Court nor the Courts of Assize have jurisdiction over offences by British subjects on foreign ships under these Acts, and that the Court of the Commissioners being still preserved, that Court, so far as these Acts are concerned, is the only tribunal with jurisdiction to try them. It also follows that, with regard to offences on British ships in foreign waters, the Admiral's Court had still jurisdiction to try them until 1834, when the Central Criminal Court was created and was invested with jurisdiction. Practically this jurisdiction may have

cf. p. 143.

General summary.

been non-existent, owing to the abolition of the Court of the Admiral in fact: but theoretically, and in law, it must be treated as existent up to this time. It is, therefore, very difficult to accept the theory of a "transfer" of jurisdiction from the sea to the land Courts, to which the Lord Chief Justice alluded: and it is all the more difficult to accept it as having been accomplished by the Act of Henry VIII. If there was a transfer, it was begun by this Act and completed by the Act of George III, so far as the Court of Commissioners was concerned. The modern Acts may, however, be regarded as having effected a transfer, but it was of the jurisdiction of the Commissioners, and not of that of the Admiral. And even here it was not only not complete, but the jurisdiction of the Commissioners was saved in its entirety. The omission of all reference to the Offences at Sea Act in the Lord Chief Justice's argument is remarkable: but it may be that in referring to the Act of Henry VIII, he did so with the amplification it had received by the Act of 1799.

In *the Franconia case*, the whole of the argument centred round the question whether there was jurisdiction over a foreigner on a foreign ship on the high seas. As I have already indicated, the question round which the greater part of the foregoing argument centres is whether there is jurisdiction over a British subject on a foreign ship on the high seas. The key to the problem lies in the meaning to be given to "high seas". It may possibly be argued that, more especially at the time when these old statutes were passed, the only legal idea attributable to the "high seas" was the Admiral's jurisdiction upon it. In old days references to this jurisdiction were never limited, but it was asserted broadly to extend "over all matters arising upon the high seas"; and it was not till *the "Franconia"* ran down *the "Strathclyde"*, that we knew what its strict limit was. But many instances have been given where "the sea" has been used as meaning nothing but the sea, and it is submitted that, unless the term "high seas" has been used at different times indiscriminately: and, when used even in modern times in contradistinction to the jurisdiction of the Admiral, has been used without meaning, it must carry with it a larger intent of jurisdiction than the term "jurisdiction of the Admiral". And, therefore, although it is true ot say that the Admiral's jurisdiction did not extend to foreign

ships, yet the high sea jurisdiction of the Commissioners must have extended to British subjects on foreign ships.

General summary.

This, it must be admitted, is in contradiction with much that was said by the Lord Chief Justice. Thus—

[L. R. 2 Ex. D. at p.169]

"If the Admiral had not jurisdiction as to offences committed on foreign ships, the Commissioners, to whom the jurisdiction was transferred by the statute, must be equally without it".

and again—

"Any doubt which could possibly exist as to the want of jurisdiction of the Admiral, in respect of offences committed on the high seas on other than British ships is conclusively disposed of the decisions of the Judges in the cases of *R.* v. *Serva and others* and *R.* v. *Lewis*."

[1 Den C.C. 104; 1 Dears & B.C.C. 182.]

It is not without much diffidence that I suggest that the argument here is wanting in elaboration.

It can hardly be denied that all the many points which were passed in review were not treated with equal minuteness, and this is specially noticeable in what is after all only the extension of the main argument. He was specially concerned with the question whether there ever had been, or was, jurisdiction over foreigners on the high seas : he assumed that his argument was equally applicable to the case of subjects in foreign ships, but the links which he assumed to exist between the two cases were hardly, if at all, examined.

Strictly speaking, although the proposition is laid down in general terms, it should be limited to the case to which it was applied. The Chief Justice had in fact fully examined the question whether the jurisdiction over foreign ships had ever been created by other legislation, and looked at as the conclusion of his exhaustive argument the statement is borne out by facts. It is only in its application to all persons on board foreign ships that I venture to suggest that it is put too broadly.

Merchant Shipping Act, s. 686.

But s. 686 of the Merchant Shipping Act, 1894, re-enacting the provisions of the Act of 1854, expressly creates the jurisdiction for the trial of offences by a British subject on board foreign ships on the high seas to which he does not belong : he may be tried by any British Court which would have had jurisdiction over the offence, if it had been committed on board a British ship within its ordinary jurisdiction. No question as to whether this enactment is *ultra vires* the Parliament can arise, for it falls within the general rule that Parliament may legislate for British sub-

jects beyond the realm, even though they are under the protection of a foreign flag. It differs only from other extra-territorial legislation in the fact that it extends a body of legislation, and not a specific enactment as in the case of other statutes. Yet even here the question to which reference has already been made is left in doubt—Is jurisdiction abandoned over British subjects who do belong to a foreign ship? If it is not, then they can only be reached by means of the procedure by commission created by the Offences at Sea Act, 1799.

General summary.

Finally, there still remains the vexed question how far the jurisdiction over British ships in foreign waters may legitimately include foreigners on board. The Admiral's jurisdiction included them, and, as already pointed out, so also does s. 687 of the Merchant Shipping Act, when they belong to a British vessel, if the section is to receive the construction which was evidently intended. But in *R.* v. *Anderson*, as we have seen, the Court declined to discuss the point. There are certain parts of the Lord Chief Justice's argument which tell against this construction.

[L.R. 1 C.C. R. 161.]

"Before we can hold the statute, from the generality of its terms, to include foreigners, we have to consider whether, according to the law of nations, the jurisdiction of the Admiral over foreigners, in foreign ships, on the high seas, existed when the statute was passed."

[L. R. 2 Ex. D. at p. 210.]

And with reference to the case of *R.* v. *Serva*, he held that it was—

[*supra*.]

"decisive on the point that by the law of England an English Court of Justice has no authority to try a foreigner accused of having committed an offence on a foreign vessel not within British waters."

[at p. 171.]

This part of the subject also, with great respect, the Chief Justice did not treat exhaustively. The question whether any given statute was intended to apply to foreigners, was referred exclusively to the jurisdiction of the Admiral—

"This being the true rule of construction [of an Act of the British Parliament], we have to consider whether the jurisdiction of the Admiral extended over foreigners on the high seas consistently with the rights of other nations, and I take it to be perfectly clear that it did not. Nor could it, consistently with the law of nations, be made to extend to them."

[at p. 210.]

But this question is sufficiently disposed of by the rule of construction applying to the term "any person", when used in extra-territorial statutes. In a statute applicable to a British ship

General summary.

it will extend to foreigners on board ; but in a statute professing to extend over the high seas, " any person " will relate only to British subjects : and such legislation will not extend to foreigners unless the intention is clearly defined.

That must depend on other questions : whether Parliament has in fact legislated in that sense : if it has, whether the Courts are bound to enforce it. It may be that there is no such legislation ; but it is submitted that the impossibility of such legislation existing is not to be derived from the limitation of the jurisdiction of the Admiral. The question of legislation for foreigners abroad differs only in degree from legislation affecting British subjects in foreign countries. Both are admittedly an infringement of the sovereign rights of other countries : though in the latter case the allegiance of the subject is the excuse. The extension of the jurisdiction of the Admiral to foreign waters was not alluded to by the Lord Chief Justice. If it exists, it is itself a departure from the normal rules of legislation. If that extension depends on the statute of Richard II, the reference to great rivers should be construed to mean the great rivers of this country. But if the statute is treated as merely referring to, and not restricting, the ancient jurisdiction, the intention of Parliament to legislate in respect of great rivers abroad is to be found in the common law, which extended the jurisdiction to all, even foreign, rivers "where the tide ebbs and flows, and where great ships go " : in itself an extra-territorial provision of the law.

If that extension of jurisdiction is warranted, so also must the provisions of section 687 of the Merchant Shipping Act be warranted ; for in some measure it deals with what was within the Admiral's jurisdiction, and in so far as it exceeds it, by dealing with offences on shore, the intention of Parliament is also clear ; and, as was suggested in the first chapter, it may possibly find its justification as being a vestige of the ancient law of the sea.

Chapter IV.

The Application of the Principles to the Statutes.

Chapter IV

We have now reached the last stage of the enquiry—the application of the principles established in the previous chapter to the extra-territorial laws of which the text, or the purport, has been set out. In order to do this with as little repetition as possible, it will be convenient to summarise the results arrived at.

Summary of principles. [see Chapter II.]

" Any person ", and " whosoever ", mean any person within the area in which the statute operates, when that area is one or more of the following—the United Kingdom normally, or, by express reference, the Empire : the individual Colonies : British ships. When the statute applies beyond any of these areas these terms mean any British subject. The same rule applies when the statute is applied to countries where the King exercises foreign jurisdiction.

In combination with words expressing a definite area these terms preserve their meaning : thus—

" any person within the jurisdiction of the Admiral " means any person on board British ships on the high seas or in embayed waters, or great rivers below bridges of this or of foreign countries : and also British subjects in the sea :

" any person on the high seas " means any person on board British ships, and British subjects on board foreign ships, on the high seas : and also British subjects in the sea.

" any person " on land beyond the seas, means any British subject.

So " any ship " means any British ship : and "wheresoever" probably means any place within the area alone in which the statute operates.

I propose now to examine the more important statutes in order to ascertain where, and to what persons, they are applicable.

THE PIRACY ACTS.

Pirates are *hostes humani generis*, and being acknowledged as subjects by no nation, may, it is generally said be punished by any nation which chooses to do so. The offence of piracy as it exists by international law has, therefore, no restrictions depen-

dent on the nationality of the person or the ship. We have only to consider the extent of the English piracy statutes.

cf. p. 89. The first Piracy Act, 28 Hen. VIII, c. 15 has already been so fully discussed that it need not detain us.

cf. p. 90. We pass to the Act of 1698—11 & 12 Will. II c. 7 : s. 7 of which deals with piracy, robbery &c., committed by natural-born subjects or denizens against " other His Majesty's subjects upon the sea ", under colour of a commission from any foreign Prince. With regard to this section there can be little doubt as to its limitation : but there can also be little doubt that it applies to offences committed anywhere on the sea, and is not limited to those committed within the jurisdiction of the Admiral, to which there is no reference. The Act deals with an offence which, from its nature, must often have been committed in foreign privateers, and it sends the offenders for trial before the Court of Commissioners established by 28 Hen. VIII, c. 15.

cf. p. 91. Section 9, however, seems to admit of, and its special preamble to warrant, a more extended construction. The "evil-disposed persons" of whom complaint is made, resided "in the plantations and elsewhere", clearly out of the realm : and it is the defects in the laws for bringing such evil-disposed persons to condign punishment which are intended to be remedied. The words used are—" all and every person and persons whatsoever who shall either upon the land or upon the seas " set forth any person or persons whatsoever " to commit any piracies or robberies upon the sea, " are to be deemed accessories. Within the meaning of the word " piracies " would undoubtedly be included those piracies against which the Act was specially directed : and it is submitted that the purview of this section includes foreigners beyond the realm, and whether on the high sea or on land. The general terms used with relation to the offence which has been aided or advised, suggest a possible further application of the section; and " any person whatsoever " having the same meaning in both parts of the section, it is not impossible that the second part extends to foreigners setting forth foreigners as pirates.

cf. p. 91. The Act of 1721—3 Geo. I, c. 24 —refers in s. 1 to " any master of any vessel, or any other person " : and this, on the face of it, applies only to masters of British ships and to British subjects. The offence of trading with pirates dealt with by the section, may be committed upon the seas generally, and is triable

according to 28 Hen. VIII, c. 15, and 11 & 12 Will. III : that is to say, within the realm by the Commissioners, and also in the American Colonies.

Section 5, which declares that the persons deemed to be accessories to the piracies mentioned in the Act of 1698, are to be tried as principal pirates, must of course be considered as an adjunct to s. 9 of the previous Act, and therefore to be applicable to the same persons.

The second part of s. 1 relates to the offence of forcibly boarding any vessel "on the high seas or in any port haven or creek whatsoever", committed by "any persons belonging to any ship or vessel whatsoever". The reduplication of the "whatsoever" must, it is suggested, have some definite meaning. The addition of the words "ports havens and creeks" covers the whole sea, irrespective the Admiral's jurisdiction.

Again, if "any vessel" in the first part of the section means any British vessel, the emphatic expression "any vessel whatsoever", in the second part, probably includes any foreign vessel. It only therefore remains to interpret "any person". It may be said that the strict rule applies, and that it means "any British subject". On the other hand, having in view the later legislation in the Merchant Shipping Act, which makes the jurisdiction over seamen dependent on the nationality of the ship to which they belong, it is possible that this part of the section also applies to foreigners on board foreign ships.

The Act of 1744 was passed expressly to amend 11 & 12 Will. III, c. 7. It deals with "all persons being natural-born British subjects or denizens", who commit hostilities against subjects under colour of commissions from the King's enemies : or who aid the King's enemies, upon the sea or within the jurisdiction the Admiralty ; and provides that they are to be tried as pirates under the Act of William III. The scope of the Act is, therefore, the high seas : its object, however, was not so much to amend the law of piracy, as to settle doubts which had arisen in the application of that law. *cf.* p. 92.

The preamble recites the mischief aimed at—the trial of subjects who had entered the service of France and Spain on board privateers of these countries. They would probably have been triable under the Act of William III, but for the doubt which had arisen whether these subjects, who were by their adherence

Chapter IV

guilty of high treason, could be deemed guilty of felony under the Act of William III, and as such tried by the Court of Commissioners: whereupon the Act provided that they shall be tried by that Court "on ship-board or on land", for piracy under that Act.

The only other Piracy Act which it is necessary to notice, is
cf. p. 93.
that passed in 1837—7 Will. IV & I Vict. c. 88—s. 2 of which deals with the punishment of piracy when murder is attempted, making it punishable by death. The Act does not in any way alter the quality of the offence, but only the nature of the punishment: and it is, therefore, suggested that it extends to any persons to whom the previous Acts extended, and to any offence dealt with by these Acts.

THE TREASON ACTS.

cf. p. 102.
The Treason Act of 1351, in dealing with the following treasons—"compassing or imagining the death of the King or Queen, or of their eldest son and heir" or "violating the King's companion, or his eldest daughter unmarried, or the wife of his eldest son and heir", uses the form "when a man", or "if a man". With regard to levying war against the King, it is expressly limited to war "in his realm". In the last case, however, the form changes, and the offence is thus described—"if a man be adherent to the King's enemies in his realm, giving them aid and comfort in his realm or elsewhere". The Act is, therefore, extra-territorial in the last case only, and is then limited to the King's subjects.

cf. p. 103.
The Act of 1543—35 Henry VIII, c. 2—is expressed to be extra-territorial, doubts having arisen as to the legality of trial within the realm of treasons committed without: and the Act provides for the trial of treasons committed "by any person or persons" out of the realm. The Act moreover does not alter the law of treason, but professes to deal first, with offences "already made and declared to be treasons", in which case "any persons" must be construed in the same way as "a man" in the Act of 1351. It also deals with offences "hereafter to be made and declared to be treasons": "any person" with reference to subsequent legislation, must be construed as applying to persons within the purview of that legislation, whomsoever they may be.

The Act of 1551 refers to "any of the King's subjects denizens or other", and to treasons "whatsoever they be, or wheresoever they shall happen to be done or committed"; they are to be tried in like manner as treasons committed within the realm. cf. p. 103.

So far the interpretation of the Treason Acts offers no difficulty. But the Act of 1795 refere to "any person or persons whatsoever" who "within the realm or without", compass or imogine the death,or harm tending to death, wounding,imprisonment, or restraint of the King, and such compassing or imaginings shall express by any printing or writing, or by any overt act or deed. The preamble recites that the causes which led to the passing of this Act were the daring outrages offered to the King on his way to and from Parliament, and the multitude of seditous pamphlets and speeches daily printed and dispersed with the intention of disturbing the tranquillity of the Kingdom. In the Treason-Felony Act of 1848, the same forms were used—"any person whatsoever", and "within the United Kingdom or without". cf. p. 104. cf. p. 104.

Following out the argument already advanced in the case of the Piracy Acts, the use of the wider form "any person whatsoever" seems to indicate an intention to include foreigners as well as subjects abroad. In this statute indeed the term seems to have greater force, for it is used not merely in contra-distinction to "any persons", but to the "any subjects" of the Act of Edward VI. And it may well be asked, if the intention were to make the statute apply to foreigners what stronger form of words, short of direct reference to them, could be devised? The authorities have never suggested that direct mention of foreigners is essential to make an extra-territorial statute applicable to them, but that the intention may be inferred.

Nor must the nature of the offence be lost sight of. It is not the mere levying of war against the King within the United Kingdom, nor the stirring any foreigner with force to invade the kingdom, which constitutes the offence, and which, had it been made an offence, would make enemies of war guilty of treason: but it is, first, the compassing or imagining the levying war against the King in order to compel him to change his counsels, or to intimidate Parliament: and, secondly, it is, as in the case of treason under the Act of 1795, the uttering or publishing of

the compassings or imaginations. And if this argument is sound, can it be said to be unreasonable, or inconsistent with international courtesy, for Parliament to provide that a foreigner who compasses and imagines the death of the Sovereign, and who publishes his "imaginations", even though abroad, should be treated as an offender against the law, and to tried and punished if and when he comes within the Kingdom? On broader grounds, and apart from any question of construction, it has been already suggested that such an enactment could be justified as defensive legislation.

cf. p. 123.

THE SEDITION ACTS.

That form of treason which consists in the dissemination of pamphlets and printed speeches leads us naturally to the offence of sedition, which was first dealt with by two Acts passed in 1797. The first—the Incitement to Mutiny Act—was passed for the better prevention and punishment of attempts to seduce persons in His Majesty's forces by sea or land from their duty and allegiance, or to incite them to mutiny or disobedience: the means specially dealt with by the Act being the publication of seditious papers.

cf. p. 105.

There is no indication of any intention to make these Acts offences when committed abroad: but they are made triable when committed at sea. And in this case, there being no reference to the jurisdiction of the Admiral, the Act must apply to British subjects, and to persons on British vessels anywhere on the sea. But in the second Act of the same year, which aimed at another form of sedition—the administering of unlawful oaths, binding the person taking them to engage in mutinous or seditious practices—offences committed "on the high seas or out of the realm" are expressly contemplated.

If the suggestion already made as to treason is sound, it would apply with equal force to sedition, and the application of these Acts to foreigners abroad would be justified, for the intention to deal with them is, to say the least, latent. But that rule of construction which has to be religiously applied stands in the way of such an interpretation, for the limitative form "any person" is used.

The same remarks apply to the "Unlawful Oaths Act, 1812,

cf. p. 106.

which deals with offences "on the high seas or out of the realm", but in which the form " any person " is also used. Chapter IV

THE SLAVE TRADE ACTS.

The short history of the Slave Trade Acts now in force is as follows.

The Act of 1824—5 Geo. IV, c. 113—still remains the defining Act for the different forms of the offence : the Act of 1843—6 & 7 Vict. c. 98—extends its operation to British subjects wheresoever residing or being : the Act of 1873—36 & 37 Vict c. 88— carries into effect slave trade treaties, but so far as British law which is enforced under them is concerned, it preserves the fundamental provisions of the Act of 1824. *cf.* p. 107. *cf.* p. 168.

The jurisdiction clause of the Act of 1824 requires careful consideration : ss. 2 to 8 define the acts which constitute dealing in slaves, and s. 9 relates specifically to " dealing with slaves on the high seas ", making it equivalent to piracy. *cf.* p. 107.

First, as to the persons by whom the offences specified in the section may be committed—it extends to Slave trade offences.

(*a*) any British subject :

(*b*) any person residing or being in any of the British dominions or territories.

Secondly, as to the area within which the offences may be committed for the purposes of jurisdiction—it extends to

(*c*) the high seas, or any haven or place where the Admiral has jurisdiction.

Thirdly, as to the offences in respect of which the jurisdiction is exercised—it extends to

(*d*) carrying away, or assisting in carrying away, any persons

i. as slaves :

ii. for the purpose of their being imported or brought as slaves " into any island colony country territory or place whatsoever " ; or

iii. for the purpose of their being sold or used or dealt with as slaves.

(*e*) shipping, or assisting in shipping, on board any vesse any persons for the purpose of their being

i. carried away as slaves : or

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ii. imported or brougth as slaves "into any island colony country territory or place whatsoever": or

iii. sold or used or dealt with as slaves;

and these offences are declared to be "piracy, felony and robbery".

Of the offences dealt with in s. 10, the following specially concern the subject in hand:—

(*a*) carrying away, or contracting for carrying away, slaves or persons in order to their being dealt with as slaves,

(*b*) importing, or contracting for importing, "into any place whatsoever", slaves or persons in order to their being dealt with as slaves;

(*c*) shipping or detaining, or contracting for shipping or detaining, on board ship, slaves, or persons for the purpose of their being imported "into any place whatsoever", in order to their being dealt with as slaves.

Act extended to British subjects abroad.

Passing to the Act of 1843, it extended, by s. 1, all the unrepealed sections of the Act of 1824 to British subjects "wheresoever residing or being, and whether within the dominions of the British Crown or of any foreign country": and the acts in connection with the slave trade, prohibited by either of these Acts, when committed by British subjects, whether "within the Dominions of the British Crown or of any foreign country", are declared to be offences. Section 4 provides for the taking of evidence in case of offences committed "in any places out of the United Kingdom, and within any Colony", in such Colony.

These provisions apply to the place of commission of the offence: removing all questions as to jurisdiction which might be raised on the construction of the old Act, so far as British subjects are concerned.

The omission of any reference to the high seas in the Act 1843 is curious: but the only area specifically mentioned in s. 9 of the Act of 1824 is the high seas. The two Acts therefore supplement one another; the preamble of the Act of 1843, recite that its object was to prohibit the trading in slaves by British subjects in foreign countries and settlements, in the same way as it is prohibited by British subjects in the British dominions.

The Act of 1824 was not, on the face of it, limited to British subjects, and it is, therefore, necessary to examine how far it applied to foreigners. It extends to "any person *residing or*

being within any of the British dominions". At first sight, this section seems only to emphasise the elementary principle that a statute applies to all persons residing within the jurisdiction—of the United Kingdom, or of the Colonies, as the case may be.

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Now, unless there is something peculiar in the nature of the offences which constitute trading in slaves, the object of inserting in so many words what is in effect a common principle, is not apparent. But when we come to the area within which the offences may be committed, the high seas, the consequence of this express inclusion of the persons mentioned in this clause cannot be open to doubt. It seems in fact expressly devised to include foreigners, for it amounts to an express provision that slave trade offences committed on the high seas by foreigners "residing or being" in the dominions, fall within the intent of the Act.

Meaning of "residing or being" in the dominions in the Act of 1824.

The full intention of the clause however cannot be arrived at until the meaning of the unusual expression "residing or being" in the dominions is ascertained. Two interpretations are possible. First, that the whole Act applies to persons included in the clause, which would of necessity include resident foreigners trading on the high seas in slaves: and, since the nationality of the ship in which offence may be committed is not mentioned, it would include them, although they trade in foreign ships, just as in the case of British subjects with whom they are assimilated. Or, secondly, that only so much of the Act applies as would by general principles apply to such persons: in other words, offences against the Act committed within the jurisdiction.

The advocates of the narrowest possible construction would, undoubtedly, appeal to the strict grammatical meaning of the words "residing" or "being" in their present sense. This would reduce the clause to a statement of the normal principle just referred to: so that offences by foreigners would only come within the provisions of the Act when committed while they were actually residing, or while they were actually within, the dominions. But then the question is inevitable: Why was this inserted, seeing that the same result would be arrived at without expressing it?

The intention of the Legislature with regard to foreigners is perhaps to be found more in a recognition of the times when

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Slave trade offences.

the Act was passed, than in a religious application of rules of interpretation which have been gradually evolved independently of the facts which brought about the actual legislation. The temptation is strong to derive, from the otherwise unnecessary introduction of words which must include foreigners, and which must apply some part of this Act to them, the desire of the Legislature to prohibit slave-trading in all its forms, not only by subjects, but also by those who are temporarily within the allegiance.

If this be so, undoubtedly Parliament has gone very far indeed, for the wide construction would include, as above pointed out, resident foreigners, trading in slaves in foreign ships. Yet, here again, the facts would probably introduce a practical limitation: for a foreigner usually resident in the dominions and trading in slaves in a foreign ship, would probably sail from a British port, and so the offence be committed, or at least, begun to be committed, under the protection of the British flag.

The act of carrying away slaves, or persons as slaves, is not limited to one place, and in the definitions there is no express reference to the place where the offence is presumed to commence. It may be committed wholly upon land, or wholly on the sea, or partly on the land and partly on the sea. Slave trade offences committed, so far as they may be committed, on land, are defined in the previous sections:—purchasing, contracting for purchase, exporting, importing, fitting out slave ships, embarking capital in or guaranteeing adventures, shipping money or goods for the purpose of, or insuring such adventures, insuring slaves, and all the many things which people may do who are concerned in the slave trade. These sections are territorial, and they apply to foreigners within the jurisdiction.

In s. 9 we come to the offences committed on the high seas, the jurisdiction being expressly limited to the offences specified in the section itself. The true meaning of this high sea jurisdiction seems to be this—There are certain offences which the Act declares to be slave trade offences when committed within the dominions, and these provisions are applicable to foreigners within the jurisdiction. But there are some of these offences which are of a continuing nature: carrying away, or shipping slaves or persons in order to their becoming slaves,—which, begun on the land, yet are continued upon the sea: and in their inception, be-

ing committed on the land, when committed by foreigners are within the scope of the Act. Yet, when the offence is continued out to sea, the offenders, being foreigners, would cease to be within the law, and so escape. Therefore the words "residing or being" seem to relate to the inception of an offence, when the foreigner would be actually within the jurisdiction : and the purport of the section would then be to continue the operation of the law so long as the offence was in process of commission, although this continuance is on the high sea beyond the jurisdiction. In other words, the law prohibits this country being made the basis of slave-trade operations ; and it is submitted that, independently of treaty, such legislation is justified.

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Jurisdiction over foreigners created with reference to inception of the offence.

The offences created by ss. 2 to 8 are summarised in s. 10, in which the penalty is provided. They do not require special consideration, as they are not assumed to be committed on the sea. Yet they show what may be called the extra-territorial intention of the commercial operations which the Act treats as offences. The carrying away into slavery probably means carrying away from any place in the dominions : but it is not clear whether the "any place whatsoever", in connection with importing slaves, is to be so construed.

It may be asked whether this somewhat lengthy analysis of an old Act is not purely academic, in view of the provisions of the Slave Trade Act of 1873—36 & 37 Vict, c. 88. This Act was passed in order to consolidate many Acts which had been passed to give effect to the several treaties entered into with foreign Powers, and for other purposes. The machinery of this Act is complicated to follow, and it is necessary also to analyse its provisions, more especially as it affects the existing legislation of 1824 and 1843.

cf. p. 108.

Analysis of Act of 1873.

The object of a slave trade treaty is to enable the vessels of the two contracting parties to be searched by the cruizers of either of them, when they are suspected, on reasonable grounds of being engaged or fitted out for the slave trade : and to authorise trial and condemnation by the special slave trade tribunals. The object of the Act is to sanction such arrangements, and give legal validity to the seizures and condemnations.

In s. 3, there are provisions for the seizure—

(*a*) of British vessels on the high seas :

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(*b*) of foreign vessels within British jurisdiction :

(*c*) of vessels not belonging to any foreign State (that is, not entitled to fly any national flag),

by certain British ships and officers : and also by the cruizers of the other contracting State authorised in pursuance of the treaty ; and

(*d*) of vessels of the other contracting State

by any ships or officers of the State, and also by the British cruizers authorised in pursuance of the treaty.

The last paragraph of the section specifies more clearly the vessels, slaves, persons, goods, and effects which may be visited and detained under the clause applicable to British ships. They are those defined by the Acts of 1824 and 1843, which are to be (by s. 24) construed as one with the Act. Section 5 gives jurisdiction to the Admiralty Courts in the dominions to deal with vessels seized under the Act, as if they were British vessels : with this proviso, that those Courts are to have no jurisdiction, not otherwise accorded by treaty, over vessels of any foreign State which have not been engaged in the slave trade within British jurisdiction. These sections sanction the machinery for putting the treaties into operation on the sea : the seizure by foreign cruizers of offending British vessels, and of offending foreign vessels by British cruizers.

The effect of the treaty is not only the grant of mutual assistance in detecting national offenders, but also the mutual recognition of the jurisdiction asserted by each State in its home waters over vessels, not flying the national flag, which offend against its slave trade laws. Thus many doubtful and difficult questions of jurisdiction are set at rest.

The jurisdiction *in personam* incorporates the old Acts.

The extra-territorial jurisdiction to seize and condemn vessels, slaves, persons, goods and effects—the jurisdiction *in rem*, is thus made to depend entirely on treaty.

There remains to be considered the jurisdiction *in personam* in respect of slave trade offences. This, so far as treaty is concerned, is dealt with by s. 27, which includes them in the schedule of the Extradition Act of 1870 : " whether committed on the high seas or on land, or partly on the high seas and partly on land." This section leaves the contracting States free to include them or not in any given treaty : and when included, the ordinary principles of extradition apply—that is, offenders who are subjects

cf. p. 110.

of the contracting States are mutually surrendered for trial to their own Courts, to be dealt with according to their own laws.

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Finally, s. 26 provides for the exercise of jurisdiction by the British Courts in regard to offences against the Acts of 1824 and 1843, in the form usual to such provisions.

The importance of this section lies beneath the surface. It is, together with s. 24 which incorporates those Acts, a definite notice that the existing jurisdiction against offenders is maintained. The contracting States enter into treaties, as it were, with full notice of the law which, under certain circumstances, may be put in force against their own subjects. It corresponds with s. 5 as to ships, though from the nature of the subject, it is worked out in less detail.

Thus the Slave Trade Act of 1873 and the treaties it recognises or which are made under it, maintain the existing laws, and with them the complicated questions of jurisdiction with which we have already dealt.

THE MURDERS ABROAD ACT.

Murders abroad.

The general extension of the criminal law to the high sea has been fully worked out in the last chapter. There is no such general extension of this law to British subjects on land beyond the sea; the only criminal law to which they are subject is contained in special statutes which create offences, and in which there is occasionally an extra-territorial extension.

cf. p. 115.

In connection with the crime of murder, the *Murders Abroad Act, 1817* requires special consideration, as it it raises the question of jurisdiction in a most difficult form. It professes to deal with murders in "No Man's Land", for reasons set out in the preamble: but before looking at these reasons we must examine the the actual terms of the statute.

The murders and manslaughters which fall within its scope are those committed by

(*a*) the master or crew (or any of them) of any British ship:

(*b*) any person belonging to such ship:

(*c*) any person sailing in such ship:

(*d*) any person who has belonged to, or sailed in, such

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ship, and who has quitted it to live in the places to which the Act refers : and

(*c*) any person mentioned in (*d*) who shall be living in those places.

The Act further contemplates the commission of the crime in or on

(*x*) land not within the King's dominions :

(*y*) any other islands or places

not within the King's dominions,

nor subject to any European State or Power,

nor within the territory of the United States of America.

The examination of this statute by the light of the ordinary rules of jurisdiction leads to no satisfactory result : on the face of it, it runs counter to the fundamental principle of extra-territorial jurisdiction, for in the categories of persons to whom the Act applies, some at least may be foreigners.

The application of the Act to the master and crew of British ships, irrespective of their nationality appears to be legitimate : to persons "belonging" to such ships, in accordance with custom : to persons sailing in such ships, in accordance with established principle, so long as they are on the ship. But the Act deals with murders not on the high seas, but on land, and after such persons have quitted such ship, extending to them even after they have taken up their residence on these desert islands : this naturally may extend far beyond the three months which has been adopted in the Merchant Shipping Act, in respect of persons belonging to a ship.

The principle on which the Act is apparently based is the acquisition of these lands by settlement : although the preamble is not very satisfactory on this point. The Bay of Honduras, where grievous murders had been committed, is described as a "settlement" though for certain purposes only, in the possession and under the protection of the King, but not within his territory or dominion : and the other islands in the South Pacific, New Zealand and Otaheite, are also described as not being within the King's dominions. There can be very little doubt that Pitcairn Island is ours by settlement, and that the case of the "*Bounty*" mutineers, which was not known in England till 1808, was one of the cases which brought about this legislation. But putting the

historical questions which the preamble raises on one side, the doctrine of settlement seems to be involved, for the basis of the Act is the coming of a British ship to a desert or savage island. It is admitted that a British subject cannot acquire territory in sovereign right for himself, but only ownership for himself, and sovereign rights for the King. Therefore, a deserter from a British vessel, setting up for himself on a desert island, acquires that island for the King : and with the acquisition of the island, comes also the right to legislate for its inhabitants of whatever nationality. But if the person who had landed on the island were a foreigner, a claim to sovereignty might be set up by the State of which he was a subject.

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The Act appears to assume that the law of murder and manslaughter does extend to these islands, and only provides a means of trial : for the preamble recites only the " difficulty of bringing to trial the persons guilty thereof ".

Jurisdiction for trial is given to the Colonial Courts in virtue of the King's commission, in the same manner as if the offence had been committed on the high seas.

The statute requires the attention of the draftsman, for its geography is a vestige of old times, and its limits of application stand in need of revision, if it is to remain on the statute book. As a matter of fact, complete jurisdiction is taken by the Pacific Islanders Protection Act, 1875—38 & 39 Vict. c. 51—s. 6 of which enables the King to exercise power and jurisdiction over British subjects " within any islands and places in the Pacific Ocean not being within His Majesty's dominions, nor within the jurisdiction of any civilized Power". The exercise of such jurisdiction is, by s. 7, not to involve any claim or title to dominion or sovereignty over the islands.

Jurisdiction in Pacific Islands.

The islands in the Pacific are thus specially treated on the same principle as that established by the Foreign Jurisdiction Act, 1870—53 & 54 Vict. c. 37. In s. 2 provision is made for the exercise of jurisdiction over British subjects in countries without regular governments from whom the right of foreign jurisdiction could be obtained. All questions which arise in connection with offences by subjects in uncivilized countries are therefore fully provided for. But this jurisdiction cannot be exercised in all the cases to which the Murders Abroad Act appears to apply.

Jurisdiction in countries without regular Government.

Chapter IV **53 & 54 Vict. c. 37, s. 2.**

Murders abroad.

Exercise of jurisdiction over British subjects in countries without regular Governments.

Where a foreign country is not subject to any Government from whom Her Majesty the Queen might obtain jurisdiction in the manner recited by this Act, Her Majesty shall by virtue of this Act have jurisdiction over Her Majesty's subjects for the time being resident in or resorting to that country, and that jurisdiction shall be jurisdiction of Her Majesty in a foreign country within the meaning of the other provisions of this Act.

NOTE.

The Sierra Leone Offences Act, 1881, (24 & 25 Vict. c. 35), the South Africa Offences Act, 1863, (26 & 27 Vict. c. 35), the West African Offences Act 1871, (34 & 35 Vict. c. 8), and the Courts, Straits Settlements, Act 1874, (37 & 38 Vict. c. 38), are based on a different, though cognate, principle to that on which the Murders Abroad Act proceeds; and it will be convenient to refer to them at this point. The preambles of the Acts are to the effect that the inhabitants of the territories adjacent to the Colony to which they refer, the limits of the territories being expressed, "being in an uncivilised state, offences against the persons and property of such inhabitants and others are frequently committed by British subjects within such territories with impunity". The law then provides that the laws in force in the adjacent Colony for the punishment of crimes therein committed, shall be extended and declared applicable to British subjects in such territories, and are to be tried by the Courts of the Colony.

In these Acts therefore there is no assumption of general jurisdiction over the inhabitants of the uncivilised country, but only a protection of them against offences committed by British subjects, and the provision of the means of trial.

THE CRIMINAL LAW AMENDMENT ACT, 1885.

The Criminal Law Amendment Act, 1885.

The scope of the two important sections of the Criminal Law Amendment Act, 1885—48 & 49 Vict. c. 68—which have an extra-territorial bearing are somewhat difficult to determine. By s. 2, the unlawful carnal connection, which, it was hoped the Act would put a stop to, may be committed either within or without the dominions: but with regard to the offence of procuring, the form "any person" is used with no indication of a more extended area of operation, and is limited to procuring within the jurisdiction. Yet it may well be the intention of the offender that the consequences should take place abroad. But the offence of threatening, dealt with in the first paragraph of s. 3, is so intimately connected with the intended consequence—the unlawful carnal connection, which may be abroad—that it is difficult to imagine them to have a separate existence in point of time. It seems pro-

bable, therefore that it was not intended to punish the offence itself—the procuring defilement by threats—when committed in the same place as the result of the offence. It is, of course, possible to imagine a threat written in England which should procure a girl to have unlawful carnal connection in France : but such a narrow limitation of the offence could hardly have been intended. It seems, therefore, to follow that the threats or imtimidation (para. *i*), or the false pretences or false representations (para. *ii*), made abroad by British subjects, in order to procure the carnal connection abroad, are within the scope of the section.

Paragraph *iii* of the same section, which refers to the administration of drugs with the same intent, is drafted differently. The unlawful carnal connection must, it is presumed, take place within the dominions, unless the reference in the previous provisos to " without the dominions " is surplusage, as it is omitted in this paragraph. The words " such woman or girl " refer to the " woman or girl " mentioned in the proceding paragraphs : that is one "not being a common prostitute or of known immoral character".

THE CIVIL SERVICE ACTS.

The Official Secrets Act 1889—52 & 53 Vict. c. 52—by s. 6, applies to offences committed by " British officers or subjects elsewhere than in the dominions ". The Acts relating to the civil service, in so far as they contain any penal provisions, naturally apply to all civil servants of the Crown wherever they are serving : and when any offence is contemplated, as in the present case, as being committed abroad, it would, it is presumed, apply to foreigners in the service when committed abroad. It must be confessed, however, that the language of s. 6 (i) is by no means clear in this point. Offences under the Act may be tried by any competent British Court in the place where the offence was committed, (which, presumably, includes Foreign Jurisdiction Courts), or, under the Offences by Public Officers Act, 1802—42 Geo. III, c. 85—in the Courts of the United Kingdom. This Act also deals generically with offences committed " out of Great Britain ".

cf. p. 110.

THE FOREIGN ENLISTMENT ACT 1870.

The application of the different sections of this Act depends

cf. p. 111.

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The Foreign Enlistment Act, 1870.

on the form used in each case; the following are employed—"any person being a subject within or without the dominions", "any person within the limits of the dominions", and "any person"; and, except with regard to s. 11, no questions of any difficulty arise.

[L.R. 1896, 2 Q. B. 425.]

The scope of this section was discussed in *R.* v. *Jameson*, the case in which Lord Russell C. J., laid down the series of propositions for determining the application of extra-territorial legislation, which have already been examined.

cf. p. 119.

It will be observed that the section is made up of two distinct parts: the first is limited to persons within the dominions. —"If any person within the limits of Her Majesty's dominions, and without the license of Her Majesty, prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State, the following consequences shall ensue:"—So far as the preparations for the expedition are concerned, they must be made by subjects of the King, or by foreigners in any part of the King's dominions.

But it is clear from the form in which the "consequences" are framed, that that they must be considered as separate enactments. The first sub-section refers to "every person engaged in such preparation of fitting out": and, by s. 2, the Act extends to all the dominions. Reading the two sections together, the conclusion come to was, that although there must have been a preparation in the dominions, yet, when that fact is established, there may be an assistance in such preparation, or an employment of the kind mentioned in the section, outside the dominions, which would amount to an offence against the Act, if the person rendering such assistance, or accepting such employment, be a subject of Her Majesty.

The extra-territorial intention of the provision may be derived from the nature of one of the offences contemplated—being employed in such expedition—which could not be otherwise than beyond the dominions. The argument, in some measure, resembles that advanced in connection with the construction of the Slave Trade Acts. The learned Lord Chief Justice went further, and applied the same principle to an assistance in the preparation of the expedition, which might, though not necessarily must, have occurred beyond the dominions: on the ground that,

cf. p. 170.

according to the context, this was included in the mischief aimed at by the Act.

In another case arising out of Jameson Raid, *Burrows* v. *Rhodes and Jameson*, it was held that a person who been induced to become a party to the raid by the fraud and false representations of the defendants as to the legality of the service, and as to the support promised by the Government, was entitled to recover damages for the loss of a leg, and special damages for the loss of kit and earnings. [L. R. 1899, 1 Q. B. D. 816.]

Section 11 was also considered in *R.* v. *Sandoval*, and the word " expedition " explained. [16 Cox C. C. 206.]

Colonel Sandoval, a foreigner residing in England, bought some guns and ammunition which were shipped on board a general trading ship to Antwerp : thence on board another ship, on which he embarked as leader of an enterprise which arrived off Trinidad, where the English flag was hauled down and a foreign flag run up. The defendant landed, and the ship having been transferred to a foreign general officer, engaged in warlike operations with a Venezuelan ship of war. She in fact arrived just at the opportune moment when a revolution broke out : a coincidence which Wills J. held would have belonged to the marvellous, if the possibility of such a revolution had not been known to the defendant. It was argued that there was no "expedition" prepared or fitted out in the dominions : but the Court held that the moment any overt act of preparation is done the statutory offence is committed : the statute being devised to defeat such attempts, and prevent the mischievous consequences likely to ensue to this country from them.

The meaning of the expression "foreign State at war with a friendly State" [s. 3], was explained in *United States of America* v. *Pelly*, to refer to the time when the hostilities have in fact begun, whether war has been formally declared or not, and whether the British Government has officially notified the existence of the state of war by a declaration of neutrality or not, so long as the fact of hostilities having been begun was within the knowledge of the person whose acts are called in question. [W. N. 1899, 10 (I).]

THE EXPLOSIVE SUBSTANCES ACT, 1886.

The forms used in the Act are " any person who within or (being a British subject) without the dominions, " and " any

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person ". The extra-territorial application of the Act is therefore clear.

The Explosive Substances Act, 1886.

The offences specially dealt with are acts done out of the United Kingdom, with intent to cause explosions in the United Kingdom of a nature likely to endanger life, or to cause serious injury to property. For all purposes of trial the offence, when committed out of the United Kingdom, is to be deemed to have been committed in the place in which the person is apprehended or in custody.

THE SUBMARINE TELEGRAPH ACT, 1885.

cf. p. 112.

The forms used in this Act are also "any person who within or (being a British subject) without the dominions ", and " any person " ; and the Act applies " to all places within the jurisdiction of the Admiralty of England " [s. 11]. This method of referring to the Admiral's jurisdiction as if it were a jurisdictional area, has already been alluded to. Its meaning is well understood, and the penal clauses in which " any person " is used are applicable to subjects and foreigners on board British ships on the high seas. But it is not clear what the effect of this extension to the sea would be in the case of an offence limited to British subjects beyond the dominions. For example, by s. 3 (5), any person who within or (being a subject of His Majesty) without the dominions, is accessory to an offence under the Act is to be punished as a principal. Would this apply to a foreigner on board a British ship on the high seas ? The answer to this question would hardly be arrived at without a reference to the greater part of the argument contained in the preceding pages. It will be noticed that this extension is made subject to consistency with the tenor of the Act. The extension of the Act to places where the King has jurisdiction does refer to a jurisdictional area, and neither of the forms could include a foreigner.

cf. p. 137.

The interpretation of the Act depends on the convention which is contained in the schedule, and it will cease to be operative when the convention ceases to be binding on the Sovereign.

By clause 8 of the convention, the tribunals competent to take cognizance of infractions of its articles are those of the country to which the vessel on board of which the offence was committed belongs. This clause supplies the meaning to the terms used in the Act. Part XII of the Merchant Shipping Act

1894, applies to the trial of offences under the Act : this includes s. 687, which has already been considered.

THE FORM IN WHICH EXTRA-TERRITORIAL JURISDICTION IS CONFERRED ON THE TERRITORIAL COURTS.

Meaning of words creating jurisdiction.

There remains to be examined the exact meaning of the words by which jurisdiction is given to the territorial Courts over offences which are normally beyond their jurisdiction.

Offence to be tried as if committed on land.

There is, in the first place, the simple form which declares that the offence committed on the high sea or abroad is to be tried in the same way as if it had been committed on land. This form is used in s. 9 of 24 & 25 Vict. c. 100, which deals with murder or manslaughter abroad : the offence may be tried and punished in any county or place in England in which the offender is apprehended or in custody " in the same manner in all respects as if such offence had been actually committed in that county or place ".

cf. p. 44.

Offence to be tried where part of offence committed.

A variation of this is to be found in s. 10, which deals with the trial of murder or manslaughter where the death or cause of death only happens in England : the offence may be tried and punished in the county or place in England in which either the death or the cause of the death shall happen, " in all respects as if such offence had been wholly committed in that county or place ".

cf. p. 114.

The object of these two forms is different : the first creates a jurisdiction otherwise non-existent, the second settles doubts as to jurisdiction due to the fact that two places are concerned, and either or neither might otherwise be held to be the place of commission of the whole offence.

A variation of the simple form is to be found in s. 9 of 24 & 25 Vict c. 94. Being accessory within the jurisdiction of the Admiralty to a felony wherever committed, is declared to be a felony, " and in any indictment for any such offence the venue in the margin shall be the same as if the offence had been committed in the county or place in which such person shall be indicted ".

In 28 Hen. VIII, c. 15, the form is that the offences committed on the sea are to be tried " in like form and condition " as if they had been " committed or done in or upon the land ".

cf. p. 90

In the Offences at Sea Act, 1799, offences committed

cf. p. 94.

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upon the high seas are "declared to be offences of the same nature respectively, and to be liable to the same punishments respectively as if they had been committed upon the shore".

Offence at sea deemed of the same nature as if committed on land, and triable accordingly. *cf.* p. 142.

This form is adopted in the Criminal Law Acts of 1861 with the substitution of the word "deemed" for "declared" the offences are "deemed to be of the same nature and liable to the same punishments as if they had been committed upon the land": and power is given to try in the county or place where the offender is apprehended or in custody, "in the same manner in all respects as if they had actually been committed in that county or place".

If these forms were the only ones used, there would not be much difficulty in determining their meaning. Another form is, however, occasionally to be found, as in the Slave Trade Act 1873, s. 26 of which is as follows—the offence shall "be deemed to have been committed either in the place in which the offence was committed, or in the county of Middlesex, or in any place in which the person guilty of the offence may for the time being be." The question which these words raise is, whether a provision that an offence committed in one place is for the purposes of jurisdiction *deemed to have been committed in another*. has a wider legal meaning than the normal provision that an offence committed in one place is *deemed to be of the same nature as if it had been committed in another*. On the face of them, these two sentences bear different meanings, but the question needs analysis. Now a provision that one act is to be deemed of the same nature as another act, clearly affects the quality of the act in question. If it is not *per se* an offence, and the act to which its nature is assimilated is an offence, it also must become an offence: the statement of liability to the same punishment is hardly necessary. So in the case of an act committed on the high sea—a slaughter of wild birds, for example, — it is not *per se* an offence, because it is committed in a place over which the Wild Birds Protection Act, 1889, does not normally extend. It is not treated as a special offence and declared to be a felony, as in the case of accessories at sea to offences on shore: but for the purpose of bringing the act within the jurisdiction of the Courts, it is declared to be of the same criminal nature as the same act committed on land, and liable to the same punish-

cf. p. 109.

Offence at sea deemed to have been committed on land.

cf. p. 100.

ment. The act is still treated as having been committed on the sea. Chapter IV

But a provision that an act committed in one place shall be deemed to have been committed in another, has, it would seem, a very different meaning: it discards the actual place of commission and substitutes another, which is wholly or in part fictitious. Now the territorial jurisdiction of the Criminal Courts depends on the place of commission. "Deemed to have been committed" examined.

The two provisions are quite distinct, for the criminal quality of the act is here determined by the statute itself, as in the concrete case, where trading in slaves is declared to be an offence. It seems obvious that the provision that an offence committed in one place shall be deemed to have been committed in another, must have a distinct bearing on jurisdiction; and as the statute also contemplates the commission of the offence at sea or abroad it follows that the meaning of the provision is that the act committed outside the jurisdiction is to be deemed to have been committed within the jurisdiction. The result of this imaginary transition is that those consequences must ensue which would have ensued if the act had in fact been committed within the jurisdiction. Here also it would seem to be hardly necessary to add anything with regard to trial and punishment.

In the section under consideration, this imaginary transfer of the *locus* of the offence is stated to be for all purposes of and incidental to the trial and punishment of a person guilty of an offence", and also "for all purposes of and incidental to the jurisdiction of any Court with reference to such offence." The effect of these words must be carefully examined.

The words "deemed to have been committed" are not unfamiliar. In the same section of the Slave Trade Act [s. 26], they are used for the purpose of settling the troublesome question of jurisdiction which arises where the act is begun in one place and completed in another: thus—

> Where any such offence is commenced at one place and completed in another, the place at with such offence is to be deemed to have been committed shall be either the place where the offence was commenced, or the place where the offence was completed.

This differs from the form used in the case of murder already noticed, where the offence is merely made triable at a certain place as if it had happened there.

So in the case of accessories, this form is used in the same

Chapter IV Act for a similar purpose, and this, in its turn, differs from the form used in the case of accessories at sea to felonies wherever committed : thus—

> Where a person being in one place is accessory to, or aids and abets in any such offence committed in another place, the place at which such offence is to be deemed to have been committed shall be either the place in which the offence was actually committed, or the place where the offender was at the time of his being so accessory, aiding, or abetting.

In these two cases the words are used for the purpose of creating a jurisdiction not otherwise clearly existent. There seems, therefore, to be little doubt that when they are used with regard to the offence itself, they are used deliberately, and with intent that they should be given their normal meaning : which is, that the Court of a place which has not otherwise jurisdiction in respect of an offence, is invested with that jurisdiction. But the question arises whether this method of creating the jurisdiction of the Court, has any bearing on the troublesome question of jurisdiction over foreigners beyond the realm.

Effect of "deemed to have been committed" on questions of jurisdiction.

The question may be put in this way : Do these words create a jurisdiction over a person in respect of the offence who would not otherwise be subject to that jurisdiction ? Suppose, for example, a certain act committed at sea by a foreigner on board a foreign ship, and the law to declare the act to be an offence, and to provide that the offence when committed at sea is to be deemed to have been committed upon the land : would this make the foreigner amenable to a jurisdiction which would otherwise be non-existent against him ?

The point arises in connection with the Fisheries (Dynamite) Act, 1877, where the same form occurs.

40 & 41 Vict. c. 65, s. 3.

> Any offence committed under this Act, on the sea coast or at sea, within one marine league of the coast, shall be deemed to be committed in a public fishery, and if beyond the ordinary jurisdiction of any Court of summary jurisdiction, shall be deemed either to have been committed on the land abutting on such sea coast or adjoining such sea, or to have been committed in any place where the offender is found, and may be tried and punished accordingly.

The question here is a very practical one : does this section apply to foreigners on board foreign ships ?

The section, having transferred the *locus* of the offence, provides that the offender " may be tried and punished accordingly". In this case the full effect of the word " deemed " is emphasised

by its twofold use, both with regard to the fishery and with reference to the jurisdiction. The creation of the public fishery depends on it : and so also must the jurisdiction, and with the following result.

The offence committed at sea is to be deemed to have been committed on the land : it follows that the offender acting at sea is to be deemed to have acted on the land. In the case of a foreigner the consequence of this imaginary transference should be to bring him from a place where he was not subject to the law, to a place where he is subject to it. If this argument is sound there is an assumption of jurisdiction which, on the principle of self-defensive legislation, would appear to be amply justified in a statute, the express object of which is to protect a public fishery.

But there is another rule of construction, which must be considered before any final conclusion can be arrived at.

The non-existence of jurisdiction against foreigners may result either from express words, or by construction. Thus, a section specially applicable to British subjects could not be made, by any form of words conferring jurisdiction, to apply to foreigners, as we have already seen in connection with the Submarine Telegraph Act, 1885. But where it is inferential only, in the case of a section beginning with "any person", the enactment applies to "any person within the area of jurisdiction in which the law operates, irrespective of nationality". Foreigners are not included in this expression when used in legislation applicable beyond the sea, because there is there no area of operation of English statutes. Beyond the realm and the protection of the flag, the application of the law becomes purely personal, and "any person" refers only to British subjects. But suppose a provision with regard to an offence committed by "any person", that when committed in a foreign country or on the high sea, it is "to be deemed to have been committed on the land"? Both the offence and the offender are transferred within the area in which the law operates normally : with the result that the foreigner would come within the application of the words "any person". Therefore, this would bring an offence by a foreigner abroad, or on the high sea, as suggested in the case of the Dynamite Act, within the operation of the statute, and make him, when in this country, amenable to the Courts.

cf. p. 180.

It may be said that laws are too carefully drafted to admit

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of jurisdiction being given over foreigners by a side-wind. That assumes that it is not a deliberate creation of jurisdiction.

Effect of "deemed to have been committed for the purposes of trial".

There is still one question to be considered in connection with s. 26 of the Slave Trade Act. The fictitious transfer of the *locus* of the offence to the county of Middlesex is, as indicated above, for the purposes of trial and punishment and of the jurisdiction of the Court. This form, therefore, lies midway between the common form which provides that an offence committed at sea shall be tried as if had been committed on the land, and the uncommon form which enacts that an offence committed at sea shall be deemed to have been committed on the land.

Stated briefly thus, it seems at once to follow that the limitation means that it is for the purposes of trial only, and that this would exclude such a question of interpretation as is involved in the extension of jurisdiction over foreigners beyond the realm. But then, why should this different language have been used, for the common form is sufficient for all purposes of trial? The question must be left for solution when it arises; for the present the important point is whether the argument as to the meaning of the words "deemed to have been committed" is sound, for it shows one method of creating jurisdiction over foreigners beyond the realm.

By way of final illustration, we may examine the point as it might arise under s. 16 of the Foreign Enlistment Act 1870, in which "deemed" is also used.

33 & 34 Vict. c. 90, s. 16.

Any offence against this Act shall, for all purposes of and incidental to the trial and punishment of any person guilty of any such offence, be deemed to have been committed either in the place in which the offence was wholly or partly committed, or in the place within Her Majesty's dominions in which the person who committed the offence may be

There are three distinct formulae used in the different sections of this Act: thus, s. 8, which provides the penalty for illegal ship-building, is expressly limited to "any person within the dominions": and s. 4, which punishes enlistment in the service of a foreign State without the King's license, is expressly limited to "any person being a British subject within or without the dominions". But s. 6 creates the offence of inducing any person to quit the dominions under a false representation of the service in which he is to be engaged, with intent that he may accept any engagement in the military or naval service of any foreign State

at war with a friendly State: this is an offence when committed by "any person". Such an inducement may obviously be held out from abroad, and the first question is whether the section applies to British subjects abroad. The motive of Lord Russell's judgment in *R.* v. *Jameson* is in favour of an affirmative answer: for that also would be within the mischief aimed at by the Act. The question, therefore, depends on the meaning of s. 16: and if the argument as to the meaning of the words "deemed to be committed" is sound, there can be no doubt that the Courts of the place in the dominions where the offender may subsequently be, are invested with jurisdiction by the use of these words.

cf. p. 178.

But with regard to foreigners, although it may be said that the probability is greater that an inducement should be held out from abroad by a foreigner than by a British subject, and the case so fall within the mischief of the Act, yet a comparison of this section with that of the Dynamite Act shows that the two forms have been used with what appears to be a deliberate variation in intention.

PROVISIONS AS TO TRIAL OF OFFENCES ON LAND BEYOND THE SEA.

The last question to be considered is the provision made in the several Acts for the trial of offences under them.

As we have already seen, the high sea offences are fully provided for by general provisions: the result of our investigation was that an enactment that "all offences" committed at sea should be tried as if they had been committed on land, covered the whole ground, and that therefore there was no necessity to inquire what provisions had been made in any special statute. But there is no such special enactment with regard to offences committed on land beyond the sea, except in so far as they may fall under s. 687 of the Merchant Shipping Act, 1894; and it is therefore necessary to examine each Act specially.

Examination of provisions for trial in different statutes.

The Treason Act, 1543, was passed expressly for obviating doubts as to the trial of treasons and misprisions of treasons committed abroad.

The Treason Felony Act, 1848, though expressed to deal with offences committed within or without the kingdom, and though it contains provisions relating to the number of witnesses required, to the time within which prosecutions are to be com-

cf. p. 103.

cf. p. 104.

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menced, to convictions, in fact to all the incidents of trial, including that of accessories, and also for trial in Scotland, yet contains no provision for trial when the offence is committed abroad.

cf. p. 105. *The Incitement to Mutiny Act, 1797,* provides only for the trial in the county of offences when committed on the high sea: but the *Unlawful Oaths Act* of the same year, contains similar provisions for the trial of offences committed on the high sea or

cf. p. 106. out of the realm. *The Unlawful Oaths Act, 1812,* contains the same provisions.

cf. p. 107. *The Slave Trade Act, 1824,* contained, in s. 48, provisions for trial of offences committed abroad or on the high seas or in any place within the jurisdiction of the Admiral, by commission under 28 Hen. VIII, c. 15, or subsequent Acts; and, in s. 49, for trial of offences committed in any place not within the jurisdiction of the Admiral, and not being within the dominions: the offences being to be dealt with as if they had been committed in the county of Middlesex. Both these sections are now repealed. The preamble to s. 4 of the Act of 1843 recites that they had proved ineffectual "by reason of the difficulty of proving in this kingdom, matters and things done elsewhere", and provision was made (by s. 4, and while the earlier sections were still in force) for the taking of evidence in the Colonies for trials before the Queen's Bench for a slave trade offence, committed "in any place out of the United Kingdom and within any British Colo-

cf. p. 109. ny". Section 26 of the Act of 1873 now creates the jurisdiction of the Courts for the trial of offences, not only under that Act, but also under the Acts of 1824 and 1843, with which it is to be construed as one Act.

cf. p. 110. With regard to civil service legislation, the *Offences by Governors Act, 1698,* and the *Offences by Public Officers Act, 1802,* were passed expressly to provide for the trial of such offences in the United Kingdom: and the *Official Secrets Act, 1889,* also contains a special provision [s. 6] for such trials.

cf. p. 111. *The Dockyards Offences Act, 1771,* contains the usual provision for trial in the county.

cf. p. 111. *The Foreign Enlistment Act, 1870,* makes regular provision for trial in s. 16.

cf. p. 112. In the *Explosive Substances Act, 1883,* there is a provision that offences committed out of the United Kingdom are to be deemed, for the purposes of trial, to have been committed

in the place in which the person is apprehended or in custody.

Offences against the *Submarine Telegraph Act, 1885*, are treated [s. 7] for purposes of trial, as if they were offences under the Merchant Shipping Act, and are therefore covered for all practical purposes by s. 686 of that Act.

cf. p. 112.

The *Criminal Law Amendment Act, 1885*, contains no such provision.

cf. p. 113.

In the result, therefore, we find that there is a provision for the trial of offences when committed abroad in all cases except the Treason Felony Act, the Incitement to Mutiny Act in so far as it is applicable beyond the seas, and the Criminal Law Amendment Act, 1885 : and this, whether the offence is committed by subjects or foreigners.

This gives rise to the following question : Is the rule as to absence of jurisdiction in the territorial Courts over offences committed out of the realm so absolute, that, although a statute expressly declares an act when committed abroad to be an offence, the omission of a clause creating the jurisdiction of the Courts renders the statute inoperative ? It need hardly be said that the question is not only important as regards the above statutes, but that it also has a practical bearing on future legislation.

The machinery for the trial is provided.

The two machinery statutes already examined both refer to offences abroad. The Indictable Offences Act, provides for the issue of warrants in the case of offences committed on land beyond the sea, for which an indictment may be legally preferred in any place in England. In the same way, the Criminal Law Act of 1867, empowers Justices of the Peace to take the depositions of witnesses of persons charged with indictable offences on land beyond the sea. But these provisions carry us no further, nor could such Acts be expected to do so : for the question is whether, in the absence of express provision, an indictment may be legally preferred in such cases or not.

It is clear, therefore, that if these three statutes are to be enforced when the offence is committed abroad, it must depend on something which is inherent in statutes creating such offences.

This leads to an enquiry whether that old doctrine which was recited in the Treason Act of Henry VIII, that there was at

cf. p. 103.

common law no power in the Courts to try offences committed out of the realm, is sound or not; for we are in presence of a most difficult problem. If the fundamental principle on which this legislation is based is so absolute as to preclude the assumption that the Courts derive a power to try from the mere fact that Parliament has created the offence, we should come to this, that Parliament has legislated, but owing to the carelessness of the draftsman, its legislation is of no effect for want of a Court to enforce it.

The necessity for a jurisdiction clause in extra-territorial legislation examined.

The different forms adopted in drafting the jurisdiction clauses in extra-territorial legislation has already occupied much attention ; but there is still one point to be considered in connection with them.

It is obvious that the ordinary legislative form would have sufficed : thus—" any person who shall commit any of the acts declared to be indictable by this statute on the high seas shall be guilty of an offence, and be liable to the same punishment as if the act had been committed on the land ".

The meaning conveyed by the words used in what have been termed the Admiralty extension sections, might possibly be that the acts were already indictable offences when committed at sea, and that the sections merely established the procedure for trial on shore. If the Criminal Law Amendment Acts of 1861 stood alone there might be some warrant for the view. The *Post Office Offences Act, 1837*, with which all subsequent Post Office legislation is incorporated, created a series of new offences unknown to the common law. Its jurisdiction clause assimilates the trial of these offences committed within the jurisdiction of the Admiralty, to the trial of other offences committed within that jurisdiction. They may be said, therefore, to be incorporated, for the purposes of trial, with the common law offences. But the *Wild Birds Protection Act, 1889*, repeats the jurisdiction formula adopted in 1861. It would seem, therefore, that the basis on which the argument has hitherto proceeded is sound : that is to say, that these extension sections did profess to make the acts with which these statutes deal, criminal when they are committed within the jurisdiction of the Admiralty,

cf. p. 100.

cf. p. 100.

But there is another way of looking at the question which puts the whole of the preceding argument in issue, and also the necessity for these Admiralty extension sections, except in so

far as the deal with the machinery for the trial by the territorial Courts.

If we transport ourselves in imagination to the time when the Admiral's jurisdiction and the Admiral's Court were in existence, we should be in the presence of two active principles—

First : the authority of the Crown in the administration of justice in respect of offences was at sea vested in the Admiral, as exercising the authority of the Sovereign upon the sea.

This jurisdiction naturally referred, in the first instance, to the common law offences.

But this is not exhaustive ; for it is now, I think, sufficiently sufficiently established that the jurisdiction of the Admiral, probably also the Court of the Admiral, continued, in spite of the creation of other Courts with high-sea jurisdiction, into the nineteenth century ; and many statutory offences had from time to time been created. This second principle seems to follow naturally from the fact of the existence of the Admiral's Court—

Automatic application of criminal statutes to the Admiral's Court.

That any special enactments creating offences on the high sea would fall naturally within the jurisdiction of the Admiral without express reference.

Had the King two empires under one Parliament, each with its own tribunals of general jurisdiction, all legislation which was not special to either empire would, there being no provision to the contrary, come to be enforced by the tribunals of both without any special words of reference. The establishment of the Admiral's Court is lost in the haze through which the memory of man cannot penetrate : but since the Admiral's Court exercised the judicial authority of the Sovereign upon the seas, the seas for all purposes of his flag stands as it were his second empire : and the mere creation of an offence, not specially limited to the land, would naturally fall within the jurisdiction of the land Courts when the offence was committed on the land, of the sea Court when committed in British ships upon the sea. And it would then follow that an offence created with special reference to the sea, would not require a further special clause making it triable by the Admiral's Court, any more than it is necessary to declare, in the case of offences generally, that the Courts of the kingdom have jurisdiction to try them.

Passing now to the time immediately following the comple-

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tion of the jurisdiction of the Court of the Commissioners by the passing of the Offences at Sea Act, 1799, we find a Court in existence clothed with jurisdiction, and competent to try all offences then existing and subsequently created : and later still, other Courts invested into the same jurisdiction. This third proposition therefore seems to be justified :—

Any special enactments creating offences on the high seas fall naturally within the jurisdiction of the existing territorial Courts without express reference.

cf. pp. 151 *et seq.*

We have already arrived at this conclusion on the construction of the Offences at Sea Act.

This appears to militate against the principle which was advanced in the early pages of this book, that statutes do not extend automatically to the high seas : and it does so to the extent of all criminal legislation. But this in its turn depends on that question of transfer of the jurisdiction of the Admiral. If there had been such a transfer, then, as criminal statutes did apply automatically to that jurisdiction, so they would now apply automatically to the Courts to which that jurisdiction has been transferred. But if, as I think is the fact, there has been no such transfer, but merely the creation of another jurisdiction, then the automatic application of criminal laws is merely the direct consequence of a statute which expressly provided that they should so apply, and the fundamental principle is not interfered with in any way.

cf. p. 7.

cf. p. 157.

Necessity for a jurisdiction clause in statutes applying on land abroad examined.

But this point established, can the principle be extended to legislation which applies to land beyond the sea ?

The fundamental idea of what precedes is that the sea was always treated as an area for which Parliament could legislate,—in strictness, it was so much of the high seas as was occupied by ships carrying his flag—and this may even now be looked at as equivalent to a definite jurisdictional area.

But this principle cannot be extended to subjects abroad. The idea on which legislation for subjects abroad rests is purely personal : there is no recognised jurisdictional area on land beyond the seas, nor any existing Court ready to receive new jurisdiction and exercise it.

cf. p. 137.

The maxim " all crime is local " is the quintessence of all the learning on the subject. Expanded, it signifies that the Courts cannot try an offence committed on land beyond the

realm inherently : not the Court of the Admiral under its ancient jurisdiction : nor the civil Courts in their modern jurisdiction. The jurisdiction for the trial of such offences is, therefore, in need of special creation : and, in the absence of such special creation in any given statute, the conclusion is inevitable, that there is no Court competent to try cases which arise under it. Chapter IV

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Legislation applicable to the Territorial Waters.

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The law applicable to the territorial waters as it existed, according to the majority of the Judges, at the time of *the Franconia case*, has already been discussed, and also the broad features of the Territorial Waters Act, 1878, passed soon after that decision. [*see* Part I, Chapter III.]

This Act is the general enactment which both creates and legislates for the territorial waters of the British Empire, and it is essential to appreciate both what it has done, and what it has not done. It is not possible however to do more than consider some points which lie on the surface of its provisions, and which follow on naturally from questions discussed in the previous chapters. It is not drafted in very simple language : it retains old expressions which have somewhat lost their old vitality, and the impression left on the mind, after careful study of its provisions, is that there are many latent difficulties involved in them which will only be discovered as occasions arise for the Courts to interpret them. It has already been stated that the territorial waters are still high sea : it remains to justify this statement from the terms of the Act.

Territorial waters are still high sea.

The preamble refers to a " rightful jurisdiction of the Sovereign " extending, and having always extended, over the open seas adjacent to the coasts of all parts of the dominions, to such a distance as is necessary for the defence and security of such dominions.

Jurisdiction and dominion are normally coincident in extent. There is, however, nothing to show that the jurisdiction referred to in the preamble is that which flows from dominion. It is impossible to give to the words any other meaning than historical

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facts derived from actual legislation warrant. Enough has already been said to show that, leaving on one side the jurisdiction of the Admiral, the varying jurisdiction which has been claimed at different times over the high seas contiguous to the realm contained no germ of assertion of dominion. It would seem that the proper construction of the preamble is, that the first paragraph asserts the existence of a rightful jurisdiction to legislate for the defence and security of the dominions—this jurisdiction being such as we know it : and that the second paragraph indicates the measure of defence and security which Parliament was about to take—a certain extension of the criminal law to offences committed within one marine league from the coast. So far as the preamble is concerned, there is nothing which can be construed as an assertion or declaration of an extension of the realm to the 3-mile limit.

By s. 2, offences committed on the "open sea within the territorial waters" are declared to be offences within the jurisdiction of the Admiral, whether committed by a subject or not, and although committed on board or by means of a foreign ship. The jurisdiction of the Admiral, though it followed the flag, had nothing in it which imported dominion, and this, if it stood by itself, would be conclusive of the question.

The meaning of the provision can only be, that, in so far as the term "jurisdiction of the Admiral" remained in existing legislation, offences not originally within that jurisdiction were put within it when committed within the territorial waters, and that they would be triable by the Courts now invested with authority to try offences within that jurisdiction.

Definition of "territorial waters" examined.

There remains, however, the definition of "territorial waters" in s. 7, which is the interpretation to be given to the term whenever it is used in the Act.

41 & 42 Vict. c. 72, s. 7 (part).

Territorial waters of Her Majesty's dominions.

"The territorial waters of Her Majesty's dominions", in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions.

This definition raises a question of some difficulty. What part

of the sea adjacent to the coast is it "which is deemed by international law to be within the territorial sovereignty" of the King? It would seem clear from what has already been said in the chapter on "The Realm and its Waters", that the dominion waters fall within this definition. There is no indication that the "territorial waters" are treated as "dominion waters", yet it it may be that the "dominion waters" are included in the definition. To the question, what other waters are there which fall within this definition? the answer can only be found in *R.* v. *Keyn*: and the answer is that there are none. Why the dominion waters should have been brought within the definition is difficult to understand, for the apparent result is a large restriction of the jurisdiction already asserted by the Courts over these waters. Yet this is not the intention of the Act, as may be seen from s. 5, which is as follows:—

[see Part I, Chapter II.]

41 & 42 Vict. c. 2, s. 5.

Saving as to jurisdiction. Nothing in this Act contained shall be construed to be in derogation of any rightful jurisdiction of Her Majesty, Her Heirs and Successors, under the law of nations, or to affect or prejudice any jurisdiction conferred by Act of Parliament or now by law existing in relation to foreign ships or in relation to persons on board such ships.

Existing jurisdiction saved.

The "rightful jurisdiction" of the King over these waters has been established in the cases in which the Bristol Channel and Conception Bay were considered: it is a jurisdiction "in relation to foreign ships" created by the law, and, therefore, it is not affected or prejudiced by the Act. The object of the first part of the definition, if this is the proper construction of the Act, is far from clear.

In the second part the "open sea" seems to be used in contradistinction to "the sea" in the first part:—"the open sea within one marine league of the coast" is to be deemed to be "open sea within the territorial waters" for the purposes of offences with which the Act deals. The existence of *the belt* of territorial waters depends on this part of the definition. It appears, therefore, that these waters are divided into two categories: the embayed waters, and the 3-mile belt; and the result of the Act is that the existing law applicable to the first category is left untouched, and that the provisions of the Act apply only to the second.

The language of the Act shows, therefore, that there is no

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assertion of dominion over the 3-mile belt, but that it still remains high sea.

This does not remove the difficulty which has already been pointed out, that there is no low-water mark from which to measure the marine league at those places where the belt meets the dominion waters; the suggestion that the 3-mile limit merges into the outer limit of the dominion waters, the belt itself vanishing, appears to be the only solution of the difficulty.

The amendment of the jurisdiction of the Admiral.

The second point to be considered is, what jurisdiction has been created within the 3-mile belt. British ships upon the open sea were already within the jurisdiction of the Admiral. The jurisdiction (so far as ships are concerned) went no further. So far, therefore, the "amendment of the law as to the jurisdiction of the Admiral" effected by s. 2, is the inclusion within that jurisdiction of foreigners and British subjects on the open sea within the territorial waters, even when on board foreign vessels. The section does not touch the jurisdiction over all persons on board foreign ships in the dominion waters, for it is limited to that part of the territorial waters which is "open sea".

The practical result is that cases similar to that of *the "Franconia"* are put within the jurisdiction of the Criminal Courts. The section also applies to offences committed on the sea, but not on board any ship, when they are committed by foreigners within the 3-mile limit. There is also this further result, already noted, that the existing jurisdiction over foreigners on board British ships is modified within the limit, by the interposition of the Secretary of State's sanction to the prosecution. The saving of jurisdiction in s. 5 is limited to persons on board foreign ships.

With regard to the offences which are brought within this extension of jurisdiction, it seems probable that it was intended by s. 2, to provide for a general extension of the criminal law to the 3-mile belt, and that it is not limited to offences already existing at the time the Act was passed.

Meaning of "any person" in statutes extended to the territorial waters.

There are still some difficulties of construction to be considered specially connected with the application of principles already established to the 3-mile belt.

In the ordinary criminal legislation, the extension of the words "any person" beyond its usual limitation to British subjects is effected by the express provision of s. 2. But there are some statutes which apply to the high seas as being included in

the larger expression "without Her Majesty's dominions": and it is not unusual for the jurisdiction in this case to be specially limited to British subjects. Thus, in the Explosive Substances Act, 1883, many of the sections apply to "any person who within or (being a subject of Her Majesty) without Her Majesty's dominions". The language is too precise to be ignored; and although it might be contended that the intention of the Territorial Waters Act would cover an extension of the Explosives Act to foreigners on foreign ships within the 3-mile limit, it does not seem possible so to construe it, any more than it could apply to foreigners on board British ships.

cf. p. 112.

Whether Secretary of State's discretion extends to existing legislation examined.

cf. p. 180.

The same rule would extend to statutes which apply expressly to the territorial waters, such as the Foreign Enlistment Act, 1870, which, by s. 2, extends to all the dominions "including the adjacent territorial waters". The sections which refer to "any person being a British subject within or without Her Majesty's dominions", would not extend to foreigners in the territorial waters, nor could the Act of 1878 be held to extend them.

But there are also provisions which apply to "any person within Her Majesty's dominions". It seems probable that the effect of the extension of the Act itself to the territorial waters is to bring them within the dominions for the purposes of these sections: and that, therefore, they apply to foreigners on board foreign ships in the territorial waters. Any doubt on the subject would, it is suggested be set at rest by the operation of the Act of 1878. It is legitimate to suppose that this Act, in extending to the 3-mile limit legislation which normally applies only to the dominions, also extended provisions which are specially applied to the dominions. The question is, therefore, the same as that which arises under those sections which refer to "any person": that is to say, to any person within the dominions and the adjacent territorial waters. The area of the application of the statute is extended, with the result that, independently of s. 2 of the Territorial Waters Act, these sections would in the ordinary course extend to persons on board foreign ships.

Yet another question arises in connection with the Foreign Enlistment Act.

The Secretary of State has a discretionary power under this Act: by s. 19, "all proceedings for the condemnation and forfeiture of a ship, or ship and equipment, or arms and am-

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munition of war" require his sanction. Although in all probability, "expediency" would enter largely into the exercise of this power where foreigners are concerned, it is of an essentially different nature from the power given to the Secretary of State under the Territorial Waters Act. It is not a control over the prosecution of the offender, but only over the forfeiture and proceedings leading up to it: it amounts to no more than a discretion in the Crown to waive a penalty which accrues to the Crown.

From the foregoing discussion it would appear that the effect of the Act of 1878 on existing legislation is, so far, limited to the solution of any doubt which may have existed as to whether that legislation is applicable to foreigners on foreign ships in the 3-mile limit. There is then the question whether the sanction of the Secretary of State, required by s. 3 to the prosecution of foreigners, is necessary to prosecution under legislation in force prior to 1878. Section 5, set out above, expressly saves any jurisdiction conferred by Act of Parliament, or by law existing, in relation to foreign ships, or in relation to persons on board such ships. Prosecutions under existing Acts are, therefore, independent of the Secretary of State, if of their own inherent strength they are applicable to foreigners on board foreign ships in territorial waters. But where that application depends on s. 2 of the Territorial Waters Act, it would inevitably carry with it the condition that the Secretary of State must sanction the prosecution.

cf. pp. 46, and 56.

This answers the question put in connection with the hovering and quarantine laws, whether this sanction is necessary in those cases. So much of the jurisdiction as extends over foreigners in foreign ships is independent of the Secretary of State. Indeed it could not well be otherwise, for this jurisdiction does not profess to be limited to the territorial waters.

Meaning of "territorial waters" in legislation prior to Act of 1878.

There is a still more difficult question to be solved. What is the meaning of "territorial waters", when used in legislation prior to 1878. In the laws relating to sea-fisheries there is a special definition, which will be examined in the chapter dealing specially with fishery jurisdiction. But in the Foreign Enlistment Act it is used without definition, and the question what this term means might, in view of the decision in *the Franconia case*, give rise to some difficulty; for, applying that decision strictly, the result would be that Parliament had declared its intention

of assuming jurisdiction in this special case over a belt of sea, but had omitted to define the actual distance. It is not clear whether the position has been altered since the passing of the Act of 1878. This depends on the larger question whether the Territorial Waters Act has not cancelled this special provision of the previous Act. It does not seem possible to contend that it has merely supplied the missing definition. From what has been said above, the question whether the Secretary of State's sanction is necessary for a prosecution, requires for its solution an answer to this previous question.

The Fisheries (Dynamite) Act was pased in 1877, that is, between the judgment and the passing of the Act. It prohibited the use of dynamite or other explosive substance to catch or destroy fish in a public fishery, this term being intended to apply to the territorial waters. But, in this case, as might have been expected, the term is not used, but the actual measurement "one marine league from the coast" is given. It would appear, therefore, that the difficulty referred to in the preceding paragraph does not arise in connection with this statute.

[*see* Appendix to this Chapter.]

cf. p. 184.

Legislation in which the marine league is adopted.

It should be noted that s. 3 of this Act does not profess to create an exclusive property in the fish in these waters: it merely declares them to be a "public fishery", and prohibits the wanton destruction of fish therein by explosives, for the protection of those who have the right to fish.

The measured 3-miles and not the "territorial waters", is also expressly referred to in s. 688 of the Merchant Shipping Act, 1894, by which jurisdiction to arrest a ship within "three miles from the coast" is assumed for the purpose of Admiralty proceedings against her for damage to a British ship in any part of the world. The provision is repeated in the same terms from the Act of 1854.

57 & 58 Vict. c. 60, s. 688:—

Power to arrest foreign ship that has occasioned damage.

(1) Whenever any injury has in any part of the world been caused to any property belonging to His Majesty or to any of His Majesty's subjects by any foreign ship, and at any time thereafter that ship is found in any port or river of the United Kingdom or within 3 miles of the coast thereof, a Judge of any Court of Record in the United Kingdom (and in Scotland the Court of Session, and also the Sheriff of the county within whose jurisdiction the ship may be) may, upon its being shown to him by any person applying summarily, that the injury was probably caused by the misconduct or want of skill of the master or mariners of the ship, issue

Jurisdiction over foreign ships 3 miles from shore in respect of damage to British ships.

an order directed to any officer of Customs or other officer named by the Judge, Court or Sheriff, requiring him to detain the ship until such time as the owner, master, or consignee thereof has made satisfaction in respect of the injury, or has given security, to be approved by the Judge, Court, or Sheriff, to abide the event of any action, suit or other legal proceeding that may be instituted in respect of the injury, and to pay all costs and damages that may be awarded thereon ; and any officer of Customs, or other officer to whom the order is directed, shall detain the ship accordingly.

(2) Where it appears that, before an application can be made under this section, the ship in respect of which the application is to be made will have departed from the limits of the United Kingdom or 3 miles from the coast thereof, the ship may be detained for such time as will allow the application to be made, and the result thereof to be communicated to the officer detaining the ship, and that officer shall not be liable for any costs or damages in respect to the detention unless the same is proved to have been made without reasonable grounds.

(3) In any legal proceeding in relation to any such injury aforesaid, the person giving security shall be made defendant or defender, and shall be stated to be the owner of the ship that has occasioned the damage ; and the production of the order of the Judge, Court, or Sheriff made in relation to the security shall be conclusive evidence of the liability of the defendant or defender to the proceeding.

This provision was referred to by Cockburn, C. J., as " the strongest instance of legislation relating to foreign shipping ", as it extends the liability to seizure for damage done to British property by a foreign ship in every part of the world. He doubted however—

" whether the enactment would apply to a ship on a foreign voyage The authority is to " detain ", not seize, and would therefore, seem applicable only to a vessel voluntarily seeking our waters otherwise than for the purpose of passage, and so bringing itself within our jurisdiction ".

The section must be left with this weighty expression of opinion as to its meaning, until the question arises definitely for decision. On one point, however, I venture to think the learned Chief Justice allowed his opinion on general questions to be too much influenced by the case before him, he added—

" Moreover the purpose is to obtain satisfaction, not to punish. There is here no application of the criminal law to those on board ".

It is fundamental to the whole subject, that the principles on which jurisdiction rests are the same, whether the question arises in a civil or a criminal proceeding.

cf. p. 108.

In s. 3 of the Slave Trade Act of 1873, another expression is used, the interpretation of which is not unattended with difficulty. The reference is to vessels (irrespective of nationality)

engaged in the slave trade "within British jurisdiction". It is possible that in this case, the retroactive declarations of the Territorial Waters Act on the subject of "rightful jurisdiction of Her Majesty", might be held to have given a definite meaning to this provision, and that it may now be read as equivalent to territorial waters, because *some* jurisdiction is in fact exercised over them.

The Submarine Telegraph Act, 1886, is extended to all places within the jurisdiction of the Admiral. The revival of this phrase which treats this jurisdiction as an existing thing, is probably based on the use of it in the Act of 1870: and, as the jurisdiction of the Admiral has been extended so as to include offences committed on foreign ships in the 3-mile limitoffences, under this Act will also be included. *cf.* p. 112.

Piracy in territorial waters.

The trial of an act of piracy as defined by the law of nations, when committed in the territorial waters by a foreigner on board a foreign ship, is dealt with by s. 6, of the Act of 1878. It may be tried in pursuance of the Act or of any other Act of Parliament, law, or custom relating thereto. This is not very clear, as the result seems to be to put in doubt the question whether the sanction of the Secretary of State is required. The previous discussion on this subject tends to show that it is not necessary, unless the prosecution is based on the Territorial Waters Act.

APPENDIX TO CHAPTER V.

THE FISHERIES (DYNAMITE) ACT, 1877.

40 & 41 Vict. c. 65:—*An Act to prohibit the use of Dynamite or other explosives for the purpose of catching or destroying fish in Public Fisheries.*

Short title.

1.—This Act may be cited as "The Fisheries (Dynamite) Act, 1877."

Prohibition of the use of dynamite in public fisheries.

2.—Any person who uses dynamite or other explosive substance to catch or destroy fish in a public fishery shall be liable on summary conviction either to a fine not exceeding £20, or in the discretion of the Court to be imprisoned, with or without hard labour, for a term not exceeding 2 months.

Offences committed on sea coast, where to be tried.

3.—Any offence committed under this Act, on the sea coast or at sea, within one marine league of the coast, shall be deemed to be committed in a public fishery, and if beyond the ordinary jurisdiction of any Court of summary jurisdiction, shall be deemed either to have been committed on the land

Chapter V abutting on such sea coast or adjoining such sea, or to have been committed in any place where the offender is found, and may be tried and punished accordingly.

APPENDIX.

Definition of summary conviction.

4.—"Summary conviction" in this Act means, as to England, a conviction before two Justices in petty sessions; as to Scotland, a conviction under the Summary Procedure (Scotland) Act, 1864; as to Ireland, a conviction under the Petty Sessions (Ireland) Act, 1851, or any Acts in force for the like purpose in the police district of Dublin metropolis, or any Acts amending such Acts.

THE TERRITORIAL WATERS ACT, 1878.

41 & 42 Vict. c. 73.

An Act to regulate the law relating to the trial of offences committed on the Sea within a certain distance of the Coasts of Her Majesty's Dominions.

Whereas the rightful jurisdiction of Her Majesty, Her Heirs anp Successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions;

And whereas it is expedient that all offences committed on the open sea within a certain distance of the coasts of the United Kingdom and and of all other parts of Her Majesty's dominions, by whomsoever committed, should be dealt with according to law:—

Short title.

1.—This Act may be cited as "The Territorial Waters Jurisdiction Act, 1878,"

Amendment of the law as to the jurisdiction of the Admiral.

2.—An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly.

Restriction on institution of proceedings for punishment of offence.

3.—Proceedings for the trial and punishment of a person who is not a subject of Her Majesty, and who is charged with any such offence as is declared by this Act to be within the jurisdiction of the Admiral, shall not be instituted in any Court of the United Kingdom, except with the consent of one of Her Majesty's Principal Secretaries of State, and on his certificate that the institution of snch proceedings in his opinion expedient, and shall not be instituted in any of the dominions of Her Majesty out of the United Kingdom, except with the leave of the Governor of the part of the dominions in which such proceedings are proposed to be instituted, and on his certificate that it is expedient that such proceedings should be instituted.

Provisions as to procedure.

4.—On the trial of any person who is not a subject of Her Majesty for an offence declared by this Act to be within the jurisdiction of the Admiral, it shall not be necessary to aver in any indictment or information on such trial that such consent or certificate of the Secretary of State or Governor as is required by this Act

has been given, and the fact of the same having been given shall be presumed unless disputed by the defendant at the trial; and the production of a document purporting to be signed by one of Her Majesty's Principal Secretaries of State as respects the United Kingdom, and by the Governor as respects any other part of Her Majesty's dominions, and containing such consent and certificate, shall be sufficient evidence for all the purposes of this Act of the consent and certificate required by this Act.

Proceedings before a Justice of the Peace or other Magistrate previous to the committal of an offender for trial, or to the determination of the Justice or Magistrate that the offender is to be put upon his trial, shall not be deemed proceedings for the trial of the offence committed by such offender for the purposes of the said consent and certificate under this Act.

Saving as to jurisdiction.

5.—Nothing in this Act contained shall be construed to be in derogation of any rightful jurisdiction of Her Majesty, Her Heirs or Successors, under the law of nations, or to affect or prejudice any jurisdiction conferred by Act of Parliament or now by law existing in relation to foreign ships or in relation to persons on board such ships.

Saving as to piracy.

6.—This Act shall not prejudice or affect the trial in manner heretofore in use of any act of piracy as defined by the law of nations, or affect or prejudice any law relating thereto: and where any act of piracy as defined by the law of nations is also any such offence as is declared by this Act to be within the jurisdiction of the Admiral, such offence may be tried in pursuance of this Act, or in pursuance of any other Act of Parliament, law, or custom relating thereto.

Definitions.

7.—In this Act, unless there is something inconsistent in the context, the following expressions shall respectively have the meanings hereinafter assigned to them: that is to say,—

"The jurisdiction of the Admiral," as used in this Act, includes the jurisdiction of the Admiralty of England and Ireland, or either of such jurisdictions as used in any Act of Parliament: and for the purpose of arresting any person charged with an offence declared by this Act to be within the jurisdiction of the Admiral, the territorial waters adjacent to the United Kingdom, or any other part of Her Majesty's dominions, shall be deemed to be within the jurisdiction of any Judge, Magistrate, or officer having power within such United Kingdom, or other part of Her Majesty's dominions, to issue warrants for arresting or to arrest persons charged with offences committed within the jurisdiction of such Judge, Magistrate, or officer:

"United Kingdom" includes the Isle of Man, the Channel Islands, and other adjacent Islands:

"The territorial waters of Her Majesty's dominions", in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty: and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions:

"Governor," as respects India, means the Governor General or the Governor of any Presidency: and where a British possession consists of several constituent Colonies, means the Governor General of

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the whole possession or the Governor of any of the constituent Colonies: and as respects any other British possession, means the officer for the time being administering the government of such possession; also any person acting for or in the capacity of Governor shall be included under the term "Governor":

"Offence" as used in this Act means an act, neglect, or default of such a description as would, if committed within the body of a county in England, be punishable on indictment according to the law of England for the time being in force:

"Ship" includes every description of ship, boat, or other floating craft:

"Foreign ship" means any ship which is not a British ship.

Chapter VI.

Extra-Territorial Legislation creating Rights and Privileges.

Chapter VI

We have hitherto considered extra-territorial legislation only in its criminal aspect. This is but a fragment of a larger subject, for there is a considerable body of law within the application of which a British subject may fall when he is beyond the realm.

It will not be out of place before going further, to glance at the extra-territorial law of England from this broader point of view, in order to see in outline how England has dealt with a problem which presents itself to every State—how to deal with its citizens who will not, and could not if they would, stay within its confines, so that in spite of their wanderings, they should still admit their citizenship. There are two methods of solving this, as most other legal problems: the scientific, and the unscientific. The system which in some measure has been forced on us by the conditions of the Empire, but which we have also deliberately adopted, as most suited to our genius, is the unscientific. But for this very reason, from its want of form, from its having been put together at odd times and as occasion has demanded, the study of it is far more interesting than of a system which solves hypothetical rather than concrete cases.

THE GENERAL SCOPE OF EXTRA-TERRITORIAL LAW

First, there is the great body of Imperial legislation which is applicable to the dominions, and which is strictly extra-territorial. So far as Parliament is concerned, the Colonies only

General survey of extra-territorial legislation of United Kingdom.

fall within the operation of its statutes by express reference. For the purposes of the Civil Courts British subjects in the Colonies are out of the jurisdiction: and for the purposes of the criminal law process under the Fugitive Offenders Act is necessary to bring them before the Courts of the United Kingdom, when necessity arises.

The law of consular jurisdiction comes next in order of importance. The Foreign Jurisdiction Act, 1890, regulates the exercise of the jurisdiction acquired by the King "within divers foreign countries — by treaty, capitulation, grant, usage, sufferance, and other lawful means." Under this system, practically all the common law and criminal law of England, and also certain statutes specified in the schedule to the Act, are extended to British subjects who have settled for purposes of trade in Eastern countries. Power is taken to send persons charged with offences in these countries for trial to a British possession.

A special section is inserted in the Act extending its provisions to countries without regular Governments.

A similar jurisdiction is created by the Pacific Islanders Protection (Amendment) Act, 1875, over British subjects in those islands. This has already been noticed in connection with the old Murders Abroad Act; and also the analogous, though more restricted, jurisdiction given to the Courts in certain Colonies to try offences committed by British subjects in the unoccupied territories adjacent to them. *cf.* p. 175.

Then there is the law of extradition, dependent on treaty with other States, by which fugitive subjects are sent home for trial. A few points only of a general nature require special notice here. In virtue of the statute—33 & 34 Vict. c. 52—the treaties with other States cannot include political offences, nor offences committed prior to the surrender other than the crime for which the surrender is asked. The extraditable crimes, are those given in the schedule to the Act, which includes piracy and certain offences committed on board ship: others have been added by 36 & 37 Vict. c 60, including all the offences under the Criminal Law Consolidation Acts of 1861, all of which, as we have seen, may be committed at sea: and slave-trade offences were added by 36 & 37 Vict, c 88, s. 27. A person convicted for contumacy under foreign law is not extradited as a person convicted, but only as an "accused person". The definitions of *cf.* p. 97.

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General survey of extra-territorial legislation of United Kingdom.

"fugitive criminal" and "fugitive criminal of a foreign State" in the Act, refer to persons accused or convicted of an extradition crime committed within the jurisdiction of a foreign State. They therefore include foreigners accused or convicted while resident within a foreign State, and the treaties usually apply to offenders generally, an exception being made however with regard to the subjects of the extraditing State.

There is also the law applicable to merchant shipping, composed of the ancient law maritime, the Merchant Shipping Act 1894, and the Acts amending it. This law, so far as it concerns the questions with which we are dealing, has been already examined.

The law applicable to His Majesty's forces abroad, by sea and by land, is also a special subject, the principle texts of which are to be found in the Army Act and the Naval Discipline Act. There are also a few others specially applicable, such as s. 22 of the Foreign Marriage Act, which deals with marriages solemnised within the lines of a British army serving abroad; and 42 & 43 Vict. c. 8, which makes provision for the registration of deaths and births occurring, and marriages solemnised, out of the United Kingdom among officers and soldiers of the army and their families.

Further there are the rules governing the procedure for reaching defendants and others, parties to actions in bankrupcy, winding up or other proceedings, who are out of the jurisdiction: by way of summons to appear in the case of British subjects, or by notice, in the case of foreigners, that proceedings have been begun either against them or in which they are interested: or, in some special cases, allowing proceedings to continue against subject and alien alike in absence.

The law governing the enforcement in England of judgments obtained abroad is a cognate subject. And there are further, all those questions dependent on the law of status, of domicil, and of usual residence, which may be called the tentacles of the law, from which only with much difficulty a man can free himself.

Beyond these subjects, however, there is another class of legislation passed in order to mitigate the inconveniences resulting from residence abroad, and the too strict application of the rule of territoriality of law and of executive action.

The residence in foreign countries of British subjects in

great numbers, compels the recognition of the fact that they marry, make wills, are born and die abroad. These are the simple examples of the necessities of the position—a position which is common to all nations, and which each must deal with as it seems to it best—and each of these questions raises difficult questions of what is called appropriately the "conflict of law", some of which are in process of simplification by the gradual evolution and adoption of definite principles. Legislation has also in some measure dealt with these matters. It is in its nature extra-territorial, for it governs the conduct of persons abroad, conferring on them rights or privileges, to do, or even not to do, acts abroad which are contrary to the local law, yet sanctioning the recognition of such acts or omissions in spite of their inherent illegality: setting at defiance, as it were, the staple maxims of the law. In some cases it authorises action by British officials abroad.

Legislation specially applicable to British residents abroad.

Such legislation cannot be differentiated from extra-territorial criminal legislation: and its interpretation must be subject to the same rules, unless it can of itself throw more light on a subject which is greatly in need of light.

An extra-territorial statute infringes the law by which Parliament is governed, as some authorities assert, by reason of the violation of the courtesy of nations, the disregard of sovereign rights, which is involved in it. This must be from some defect inherent in the statute itself. An Act which deals with British subjects in a foreign country is based on the same inherent vice as one which professes to deal with the subjects of that country; because, by assuming to regulate the conduct of any person, whether subject or alien, in a foreign country, the statute interferes with an area which is under the sway of another sovereign jurisdiction. If an Act making a fraud committed abroad indictable in England falls within this principle, so also must an Act which enables a marriage to be solemnised in a foreign country before officers not authorised thereto by the local law, affording it recognition and treating the offspring as legitimate. And even more so: for we have now to deal with legislation by which executive acts are sanctioned abroad by our own officers, legislation which is more akin to that which was criticised by Lord Stowell in *the "le Louis"*, than to ordinary extra-territorial criminal legislation. And herein lies no point of difference making in favour of these laws, but the reverse: for not only is all crime

Fundamental principles applicable to the laws to be considered in this chapter.

cf. p. 122.

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local, but the lawfulness of civil acts is also to be judged locally —the place of the action governs the act.

Fundamental principles applicable to the laws to be considered in this chapter.

Perhaps the only justification for such legislation is that it cannot matter much to the foreign country, so long as the laws deal only with subjects in relation to their own Government or fellow-subjects : and perhaps the rule of allegiance to Parliament would give sufficient warrant to them in such a case, to entitle them to recognition even by the Courts of the country whose laws had been set aside ; but this is a question untouched at present by the Courts. Recognition is cardinal to the utility of such laws, for without it they lose much of their intended effect. The Foreign Marriage Act, for example, would cease to confer the benefit which was intended, if marriages under it were not accepted in all countries without question.

But quite apart from the question of recognition of the consequences of such legislation, it is not beyond the bounds of possibility that the law itself, in sanctioning the performance of the local law should be deemed too great an infringement of the local sovereignty to be allowed with impunity : should involve punishment on those who avail themselves of the right or privilege conferred by the English statute.

In a question of great importance, on account of its convenience and the large interests which may often be at stake, the obtaining of evidence from persons abroad, the line has already been over-stepped. Even though it concerns only such a matter, trivial apparently to the public good, as the administration of an oath to a British subject to give validity to his evidence, sovereign rights, and those other matters of high import, have been declared to be infringed, and condign punishment meted out to the offenders, in disregard of the fact that what had been done was done under the authority of the British Parliament. This smallest point alone seems to have raised grave diplomatic issues. The English Courts have not however gone to the length of saying that the local law must prevail to the setting aside of the evidence given under such circumstances, as not having been given under a properly administered oath. Yet the doctrine of the territoriality of law, and the rule of religious construction, would seem to warrant such a proposition without any stretching.

What has happened once may happen again, and still more serious consequences ensue. In this case it has resulted, as we

shall see, in a modification of the offending rule, not generally, but so far as diplomatic representation has rendered necessary. It has not yet brought about a general recasting of the laws, and a reconsideration of fundamental principles. But it affords sufficient warrant for a critical analysis of then.

The curious point about the question, not so far as I know hitherto considered, is that these laws, dealing only on the face of them with civil and social subjects, contain sections involving criminal consequences, as resulting from forgery, perjury or fraud. They are thus intimately connected with the general criminal extra-territorial law, and the application to them of the same principles of construction is, therefore, inevitable.

The subjects to be dealt with in this chapter are marriage, wills, and evidence: and with regard to each of them, we shall find legislation passed with the express object of avoiding the consequences of some rule of the local law, which would otherwise apply.

EXTRA-TERRITORIAL MARRIAGES.

Marriages contracted abroad raise troublesome questions, as the Marriage Confirmation Acts bear witness: their operation ranges from Mexico to Moscow, from Ningpo to Tahiti. The subject has been dealt with in a comprehensive manner by the Foreign Marriage Act, 1892,—55 & 56 Vict. c. 23— by which marriages abroad may be solemnised in a way not recognised by the local law. [*see* Appendix to this Chapter.]

The broad principles on which this Act is based are as follow.

All marriages between parties, of whom one at least is a British subject, solemnised in the manner provided in the Act in any foreign country or place by or before a marriage officer, are to be as valid in law as if they had been solemnised in the United Kingdom with a due observance of all forms required by law [s. 1]. But nothing in the Act is to confirm or impair or in anywise affect the validity in law of any marriage solemnised beyond the seas, otherwise than as provided in the Act [s. 2].

The same consent is required as in the case of marriages solemnised in England [s. 4], and the same power to forbid a marriage is given to parties whose consent is required.

The procedure is briefly as follows—

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The marriage procedure.

Notice having been given to the marriage officer of the intended marriage [s. 2], each of the parties is required to swear [s. 7] to certain essential matters—that there is no impediment: that they have resided for the three weeks immediately preceding within the district of the marriage officer: and in the case of minors, that the necessary consent has been given, or that there is no person having authority to give such consent.

The marriage is to be solemnised at the official house of the marriage officer with open doors, between 8 A.M. and 3 P.M., in the presence of two or more witnesses, either by another person in presence of the marriage officer "according to the rites of the Church of England or such other form of ceremony as the parties thereto see fit to adopt", or by the marriage officer himself. The marriage is then registered [s. 9], a copy of the register being in due course transmitted through the Secretary of State to the Registrar General.

The marriage officers are either authorised in that behalf by the Secretary of State by warrant, or are designed by regulations. The persons who may be authorised by warrant are British Ambassadors and Consuls, Governors, High Commissioners and Residents, and also other officers if specially prescribed.

This Act gives rise to many questions of interest and difficulty, not merely with regard to its interpretation, but also with regard to the principles on which it is based.

Rule as to validity of marriages.

The fundamental principle on which the validity of marriages depends is given by Mr. Dicey in the following rule.

["Conflict of Laws". Chapter XXVI, p. 626.

Rule 169.—Subject to the exceptions† hereafter mentioned, a marriage is valid when—

1. each of the parties has, according to the law of his or her respective domicil, the capacity to marry the other, *and*,
2. any one of the following conditions as to the form of celebration is complied with (that is to say):
   (*i*) if the marriage is celebrated in accordance with the local form: or

[at p. 640.]

† The exceptions are marriages which are incestuous by the laws of all Christian countries, and which are contracted by descendants of George II, in contravention of the Royal Marriage Act—12 Geo. III c. 11.

The second part of the above Rule has three other conditions, one of which relates to marriages by English common law in a country where the use of the local form is impossible; and the remaining two to marriages under the Foreign Marriage Act.

(*ii*) if the parties enjoy the privilege of exterritoriality, and the marriage is celebrated in accordance with any form recognised as valid by the law of the State to which they belong.

The Act sets aside the necessity for observance of the local form—not, be it observed, in the case of marriages between British subjects, but in case of marriages where one of the parties only is a British subject—and substitutes the ceremony prescribed, which is practically the English law of marriage in a Registry. It also imposes many conditions which are based on the law of England.

Principle on which the Act is based.

It must strike the student at first sight that this Act is closely allied to the Foreign Jurisdiction Act; that it does in fact create a marriage jurisdiction, with executive officers to carry it out, in foreign countries, precisely in the same way as the other Act creates a civil and criminal jurisdiction, with judicial officers to carry it out. But the reading of the first few lines of the two laws reveals a fundamental point of difference. The Foreign Jurisdiction Act is based on the fact that the King has acquired jurisdiction in certain countries "by treaty, capitulation, grant, usage sufferance, and any other lawful means". The Foreign Marriage Act contains no such recital: it merely authorises the performance of the marriage ceremony "in any foreign country or place". There is no treaty or capitulation: there is no grant or usage: there is no evidence of sufferance to support it. But the question does arise, whether by "lawful means", this ceremony may be performed by British officers by the authority of the British Parliament, in territory over which that Parliament has no authority whatever.

Act is not based on exterritorial privileges.

The doctrine of exterritoriality cannot be said to cover completely the principle of the Act. The British Ambassador, or the Minister, or Chargé d'Affaires, is one of the marriage officers indicated by the Act: his official house one of the places where the the marriage may be solemnised. But, without going further, it is clear that the Act does not square with the law as to exterritoriality as generally understood, for that law by no means extends to "any officer" who may be designated as a marriage officer, one who is not necessarily in the suite of the Ambassador: nor to "any house" which may be designated as the "official house" of the Ambassador. The doctrine of exterritoriality is a privi-

lege dependent on grant and not on assertion ; and it is not possible for a State to determine what its exterritorial privileges shall be in another State.

It must be specially noted that the operation of the Act is not limited to countries without regular forms of government, nor to countries with which treaties creating consular jurisdiction may be made. These countries are included in the general scope of the Act, the Consuls being included among the marriage officers ; but the use of the word "Ambassador" shows that its contemplated operation extends to the Great Powers : except "where sufficien facilities appear to exist therein for the solemnisation of marriages to which a British subject is a party " ; in which case the powers of the marriage officers may be restricted by regulations under s. 21. In the result, therefore, the principle on which the Foreign Marriage Act is based is that this authority may be granted to its executive officers independently of treaty : and the idea which underlies this must be, that whereas the exercise of any jurisdiction in legal matters, whether civil or criminal, is an exercise of the sovereign power, and therefore one which cannot be exercised in any country in which there is a Government capable of entering into conventions, the control of marriages is not an attribute of sovereignty. The Sovereign is not presumed to preside over the marriage ceremony as he does, in the constitutional imagination, over the deliberations of the Courts of Law. A similar Act dealing with the custody of lunatics or infants would probably be conceived in a different spirit. Unless this be true, the legislative warrant for the exercise of powers under the Foreign Marriage Act, in so far as they are not covered by exterritoriality, falls within the last of Lord Justice Cotton's five propositions. If it were to be accepted as the law, that what has been done by Parliament must coincide with what Parliament may do, the operation of the Act, that is to say, the recognition of marriages performed under it, would be limited to those to which both parties are British subjects. The application of Lord Russell's ultimate proposition would secure the recognition of all marriages, even where one party is a foreigner ; for the language is clear, and no other construction is possible. The question in issue is whether Lord Stowell's doctrine, in the case of *the* " *Le Louis* ", would be applied to the extent of declaring this Act invalid.

The Act applies to all countries.

cf. p. 120.

cf. p. 120.

This possibility seems to have been present to the mind of the

legislator, for s. 10 gives power to the marriage officer to refuse to solemnise a marriage, "if in his opinion the solemnisation thereof would be inconsistent with international law or the comity of nations". There is a right of appeal from such refusal to the Secretary of State.

Marriages not to be solemnised when solemnisation "inconsistent with international law."

The first paragraph of the regulation clause [s. 21], is conceived in the same spirit : it provides that regulations may be made by Order in Council, prohibiting the exercise by marriage officers of their powers in cases where it appears to be inconsistent with international law or the comity of nations.

The solemnisation of marriages "contrary to international law" seems at first sight to refer to marriages which are contrary to international law, an expression which has no meaning, unless it could be interpreted "marriages which may result in a conflict of laws". What appears to be contemplated is, that the solemnisation of marriage by a foreign official in any given country may be contrary to international law or the comity of nations. Still further amplified, this probably means, that if the performance of the ceremony is objected to by any given State, then its performance would be contrary to the comity of nations, and the marriage officer may refuse to solemnise the marriage.

This is intended to be the saving clause of the Act. If there is no objection on the part of the State where the marriage is performed its consent will be implied, and the extra-territorial authority of Parliament in connection with marriages must, therefore, depend on this implied consent. But whether this consent covers all the provisions, including the penal clauses, is another matter.

There are other important principles involved, which it must suffice to indicate rather than to work out in detail.

Probable recognition of the law of domicil by the Act.

The parties to a marriage must not be minors unless consent be given by those who are authorised to give consent. According to the rule quoted above, the capacity to contract marriage is to be determined by the law of the domicil, and it is not to be presumed that the Act intended to set aside this fundamental rule, which here covers not only the fact of majority or minority, but also the consequences attaching thereto. But suppose one of the parties to be a minor by the law of his domicil—not necessarily a foreign country, but a British Colony governed by a foreign system of laws—and that by that law he is entitled to contract marriage without consent. Except for the provision of

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s. 7, which contemplates, most unnecessarily, majority at 21, such a case would seem to fall within the Act.

The law as to consent to the marriage.

There are difficulties too in connection with the question of consent. By s. 4 (*i*), the like consent shall be required to a marriage under the Act, as is required by law to marriages solemnised in England. This appears, at first sight, to introduce the English law as to consenting parties to a marriage. Another construction is, however, possible, which would bring the provision into harmony with the general principle. It is consent according to the law of the domicil which is required by law for marriages solemnised in England. This may vary : some formality with regard to parents may be required even after a person is of full age : or the law may not require consent, or a dispensation by some competent authority may be sufficient.

This introduces the difficult question whether the capacity to contract marriage is affected by the absence of the consent which the law of the domicil requires, or whether this is not part of the ceremonial of marriage which falls within the law of the place where the marriage is contracted*. It is hardly, necessary to consider this question, as the Act contains a direction to the marriage officer. He is to require the consent ; that is to say, the marriage is not to be solemnised unless this consent is given. If therefore the suggested interpretation of this provision is sound, it is probable that it was intended that the officer should require such consent as the law of the domicil of the parties requires.

The power to forbid must also be governed by the same law as the consent, and must exist or not according as the law of the domicil determines the question.

It would seem also that the impediments to marriage by reason of kindred or alliance under s. 7 (*a*) must also be settled by the law of the domicil : and generally, therefore, it may be said that any condition required by s. 7, which is usually governed by the law of domicil, will remain governed by that law in the case of marriages solemnised under the Act.

CRIMINAL PROVISIONS OF THE FOREIGN MARRIAGE ACT.

The penal clauses of the Act are ss. 14 and 15 ; they deal with fraudulent marriages, and false oaths in connection with marriages. From the nature of the case, although they may be

[29 L.J.: P. & M. 97.]

*This question was decided in the latter sense in *Simonin* v. *Mallac*, which is discussed in " Foreign Judgments ", at p. 281.

committed within the dominions, the offences created by these sections are more likely to be committed abroad, and it is impossible to imagine that these sections were not intended to have an extra-territorial operation. The Act indeed would have been incomplete if it had not dealt with offences abroad, for the grant of a privilege necessarily entails provision being made for the breach of any duty which is attached to the exercise of the privilege.

Offences under the Act may be committed by foreigners abroad.

But the scheme of the Act is to facilitate marriages abroad when only one of the parties is a British subject: the duties are however laid on both parties alike, and there are also duties laid on other parties, who, from the premiss that one of the parties may be a foreigner, must of necessity often be foreigners: and, from the nature of the case also, it is clear that these foreigners may be subjects of the State where the marriage is celebrated. The whole question of the extra-territorial application of criminal law is thus raised with regard to offences under this Act, quite independently of the general extra-territorial nature of the Act itself. It would seem to be obvious that the general principles which have already been established must apply to the interpretation and construction of these sections. The question is full of difficulty, and an analysis of the penal provisions is necessary.

Analysis of penal sections.

First—*as to the persons to whom they may apply.*

They are—

a—the parties to the marriage:

b—the consenting parties:

c—the objecting parties—if any:

d—the witnesses.

Secondly—*as to the offences, and the occasions when they may be committed.*

These are—

(a)—*as to the parties*—obtaining the solemnisation of the marriage by means of any false notice or false oath as to any matter for which a notice or oath is required by the Act. The notice referred to is, by s. 2, to be given by one of the parties and is to state—

i. the name, surname, profession, condition, and residence of each of the parties:

ii. whether each of the parties is or is not a minor,

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This notice may, under the circumstances pointed out in s. 5, have to be given a second time.

The oath is by s. 7, to be made by each of the parties, and is to be to the following effect—

i. belief that there is no impediment to the marriage by reason of kindred or alliance, or otherwise:

ii. that both parties have had their usual residence for three weeks immediately preceding the marriage within the district of the marriage officer:

iii. that the consent of persons whose consent is required by law has been obtained, or that there is no person having authority to give such consent, where either of the parties, not being a widower or widow, is under 21.

In addition to the offences directly arising out of the requirements of the Act, the parties may also fall under the general provisions of s. 15 (*a*) as to perjury, the penalty in such case being those provided by the ordinary criminal law. The penalties under s. 14 are ecclesiastical.

(*b*)—*as to consenting parties*—they would come under the head of "a person" in s. 15 (*a*), the offence being the "knowingly and wilfully making a false oath or signing a false notice under the Act for the purpose of procuring a marriage."

It is, however, by no means clear how this clause can apply to the consenting parties: for no duties are laid upon them, nor is there any express provision as to the manner in which the consent is to be given. Possibly this is covered by the words of s. 4 (*i*): "the like consent" is required under the Act "as is required by law to marriages solemnised in England"; this, as we have seen, is the consent required by the law of the domicil: but any infringment of the English law as to the manner of giving that consent would become an offence under the Act. As we have seen the burden of proving the consent is thrown by s. 7 on the parties to the marriage, and it seems at least doubtful whether any document signed by the party whose consent is required is necessary under the Act. It should also be noticed that by s. 13, after the marriage has been solemnised, "it shall not be necessary in support of the marriage to give any proof of the consent of the person whose consent is required by law, nor shall any evidence to prove the contrary be given in any legal proceeding

touching the validity of the marriage". A consenting party therefore would only come within the penal sections, if for any reason the consent, or the fact of being a consenting party, were sworn to by him.

(c)—as to objecting parties—the foregoing remarks are also applicable to objecting parties. There is however one offence specially applicable to them: any one who forbids a marriage by falsely representing himself to be a person whose consent to the marriage is required by law, knowing such representation to be false, is to be guilty of perjury.

(d)—as to witnesses—nothing being required of these persons except the signing of the register as witnesses, no offence by them is contemplated under the Act.

Thirdly—*as to the punishments, and place of trial.*

(a)—against the parties—the ecclesiastical law of England is to be applied, by suit "for the forfeiture of all estate and interest in any property in England accruing to the offending party by the marriage", brought by the Attorney General. This suit must necessarily be in England: and, under the ecclesiastical law, may be in absence.

(b) & (c)—against the parties to the marriage: and *against consenting* (if the case arises), or *objecting parties*—the trial is to be in any county in England, the ordinary criminal law of trial and punishment for perjury is to be applied as if the offence had been committed in that county.

Application of the penal clauses to foreigners abroad considered.

And now arises the troublesome question, do the penalties as well as the privileges, apply to foreigners?

It is submitted that where a statute creates an extra-territorial privilege which is applicable to foreigners, and also creates duties in connection with the enjoyment of the privilege: where it further imposes penalties for breach of these duties, the intention of the statute is manifest that both duties and penalties should apply to foreigners who avail themselves of the privilege. It is difficult to imagine a clearer expression of intention, nor, the law being what it is, a stronger reason for that intention. The ecclesiastical proceedings for forfeiture being *in rem*, it is suggested that s. 14 applies to, and may be enforced against a foreigner abroad, a party to the marriage.

But with regard to s. 15, we are met at once with the rule that

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" any person " by itself, in an extra-territorial enactment, does not include foreigners. Yet this statute seems to show that a modification of the strict rule must be admitted.

" Any person " does not mean " any British subject ", but " any person within the area of the application of the statute ". In statutes applicable beyond the realm it relates only to British subjects, because there is no geographical area in which the statute can operate. The question is whether it is possible to make a statute applicable to foreigners abroad by any means short of a direct reference. The statute under consideration suggests the following as a possible rule of construction. Where a statute applies to a certain class of persons, then " any person " means " any person who falls within the class " ; if the expressed intention of the provision is that foreigners are included in the class, then " any person " must include foreigners as well as subjects ; and further, if this intention is also expressed that the provision should apply abroad, then it will apply to foreigners abroad. It is suggested that in the case of the Foreign Marriage Act, this interpretation results from the ordinary meaning of the words.

Suggested rule of construction.

EXTRA-TERRITORIAL WILLS, AND ADMINISTRATION OF ESTATES, OF PERSONALITY.

Certain questions which arise in connection with the death of subjects abroad, were dealt with by two Acts passed in 1861.

THE WILLS ACT, 1861—24 & 25 Vict. c. 114.

Lord Kingsdown's Act.

The questions raised by this Act are less complicated than those which we have considered under the head of marriage : for in this case there is no power given to any British executive officer in the foreign country to facilitate the execution of wills : such a power, for example, as receiving or attesting wills of British subjects : there is, therefore, no derogation of sovereignty involved. Moreover, the nature of the subject dealt with by the Act, does not necessitate any criminal sections ; the familiar difficulty therefore does not arise.

The law of wills of personalty, with which the Wills Act alone deals, is independent of residence and of nationality, but is dependent on domicil. The subject lies outside the scope of this work, it has moreover been exhaustively treated by Mr. Dicey in his work on the " Conflict of Laws." A statement of the law is,

however, necessary, and in order to avoid travelling over well-trodden ground, I venture again to draw upon Mr. Dicey's book for certain rules in which he has embodied the general law.

Rules as to wills of moveables. [Dicey.]

Rule 181.

Any will of moveables which is valid according to the law of the testator's domicil at the time of his death is valid.

Rule 182.

Any will of moveables which is invalid according to the law of the testator's domicil at the time of his death on account of

(*i*) the testamentary capacity of the testator, or

(*ii*) the formal invalidity of the will (*i. e.* the want of the formalities required by such law), or

(*iii*) the material invalidity of the will (*i. e.* on account of its provisions being contrary to such law),

is...invalid.

Rule 183.

Subject to the exception† hereinafter mentioned, a will of moveables is (in general) to be interpreted with reference to the law of the testator's domicil at the time when the will was made.

The Wills Act modifies rule 182 (*ii*), and gets rid of the necessity for relying on questions of domicil.

Provisions of Wills Act.

Testamentary instruments made by British subjects abroad, whatever may be the domicil of the testator at the time of making the will or at the time of his death, are to be held well executed as regards personalty, and to be admitted to probate irrespective of his actual domicil, "if the same be made according to the forms required either

i. by the law of the place where the same was made: or

ii. by the law of the place where such person was domiciled when the same was made: or

iii. by the law then in force in that part of the dominions where he has his domicil of origin".

[L. R. 9 P.D. 130.]

So far as British subjects are concerned no points of difficulty suggest themselves.

But in *Bloxam* v. *Fabre*, the question arose whether an alien

† The exception does not affect the question under discussion. Rule 182 (3) is also subject to an exception, and to the effect of Rule 184. The exception relates to the Wills Act, and Rule 184 to change of the testator's domicil, to be presently discussed.

Chapter VI could avail himself of the privilege conferred by s. 1 of the Wills Act, in virtue of s. 2 of the Naturalization Act, which allows aliens, *inter alia*, to dispose of personalty "in the same manner in all respects as a natural-born British subject". The Court of Appeal decided the question in the negative, on general grounds; as indicated in an earlier chapter, I venture to consider the question raised from the point of view of the principles now under consideration.

[*see* Part I, Chapter XII, p. 167.]

Joint operation of s. 2 of Naturalization Act, and s. 1 of Wills Act considered.

The Wills Act, s. 1, is an extra-territorial enactment giving British subjects a special right with regard to the disposition by will of their personal property: the right being those legal consequences which result from the grant of probate in England. In the next chapter we shall consider the question how far rights existing in the United Kingdom may be enjoyed by non-resident foreigners: but here no such question can arise, for, so far as the Wills Act itself is concerned, the enjoyment of the right is expressly limited to British subjects. The question therefore resolves itself into this: Is the grant to aliens by s. 2 of the Naturalization Act, of the same rights as to the disposition of property as are enjoyed by natural-born British subjects, strictly a territorial provision? If it is not, then it is difficult to see why this grant should not include this special privilege created by the Wills Act. It must be noted that precisely the same question would arise in connection with what has been termed the narrow construction of s. 7 of the Naturalization Act, on which the effect of the certificate of naturalization depends: for there also the rights which are granted are those "to which a natural-born British subject is entitled", and a question might arise whether this privilege under the Wills Act is included in the rights acquired by a naturalized subject. The difference between the two provisions is that the words of limitation "in the United Kingdom" in s. 7, are omitted in s. 2.

[*cf.* Part I, Chapter VIII, p. 116.]

Now, so far as regards taking, acquiring, and holding property, s. 2, is not limited to resident aliens; nor, apart from the Wills Act, can there be any difference in connection with the disposition of property. So far as real property is concerned, the law as to testamentary disposition is the same for aliens as for British subjects, for that falls within the plain meaning of the section. The question therefore only concerns wills of personalty. The intention given to the section by the Court of Appeal was

that there should be "as large a power of disposition in an alien as in a British subject." The powers of disposition of personalty which are in a British subject are determined by the law of his domicil; to be more precise are governed by the rules already cited. The plain meaning of the provision must therefore be, that the powers of disposition in an alien shall also be determined by those rules.

The question is thus reduced to its narrowest form: Why does not this include the power conferred by s. 1 of the Wills Act on British subjects of making wills of personalty in other ways than the strict rule of domicil requires?

The law of the domicil is independent of residence in the United Kingdom, it applies to residents and to non-residents alike, and from its nature must often apply extra-territorially. Therefore, in so far as the rule which applies to wills of personalty operates extra-territorially, it is part of the general law which has governed the wills of aliens, as well as those of British subjects, since the rule was first expounded, and exists independently of the Naturalization Act.

But the rule that statutes are to be construed territorially unless the contrary intention appears, must be applied to s. 2 of the Naturalization Act; and, therefore, in so far as the actual rights which are granted by that section are concerned, it must be interpreted as having only a territorial application: the words "in the same manner in all respects as a natural-born British subject", must mean in the same manner as British subjects within the United Kingdom.

But the privilege granted by the Wills Act to British subjects contemplates their being out of the United Kingdom. The privilege cannot, therefore, be included in the rights conferred upon aliens by the Naturalization Act.

The subject is somewhat complicated by the fact that the pre-existence of this rule of domicil reduces this special provisions of the Naturalization Act to nothing. But so far as the Wills Act is concerned, it is immaterial whether the rule applied to aliens before, or as the result of, the Naturalization Act.

Joint operation of s. 2 of Naturalization Act and s. 2 of Wills Act considered.

But although non-resident foreigners would not have the benefit of s. 1 of the Wills Act, it is submitted that, following the same chain of reasoning, resident foreigners would, in virtue of s. 2 of the Naturalization Act, have the privileges which are

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granted to British subjects by s. 2 of the Wills Act. The privilege is territorial, and, setting aside the rule of domicil, allows a will of personalty to be made according to the law in force in that part of the United Kingdom where it is made : or, in the language of the marginal note " according to local usage ". It is true that the extension of this rule to foreigners could not be deduced from the decision of the Court of Appeal : indeed, that decision might be held to warrant the opposite conclusion, that the rule of domicil must be rigidly enforced with regard to them.

Application of s. 3 of Wills Act to foreigners considered.

[at p. 696.]

Finally, there is s. 3, which lays down the broad rule that a change of domicil is not to invalidate a will nor to alter its construction. Mr. Dicey, considering this provision from the point of view of general construction, has suggested that it applies to wills of aliens no less than to wills of British subjects : in other words, that it is a modification of, or rather a new rule added to, the general rule of domicil in its application to wills of personalty, and as such that it would apply to foreigners whenever the ordinary rule was applied to them, and as part of it. This suggestion is an acceptable one, and I believe is sound, unless the strict rule of construction of " any person " stands in the way.

In the sentence " the domicil of the person making the same [*i.e.* the will] ", there does not seem to be any legal value attached to the word " person ". But suppose the section had been drafted in another way, with the word " person " in its operative part, the difficulty becomes apparent : thus— " if any person shall make a will according to the law of his domicil. such will shall not be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicil of the testator. "

If this were to be construced strictly it would not apply to foreigners abroad : and the rule of construction suggested in the case of Foreign Marriage Act finds no application here, for there is no manifest intention to make the Act applicable to foreigners, but rather the reverse. The question, therefore, is whether this strict reading of the provision is necessary. Under any circumstances, however, the provision would, like s. 2, apply as to resident foreigners, in so far as it may operate territorially with regard to changes of domicil in different parts of the United Kingdom.

THE DOMICILE ACT, 1861—(24 & 25 Vict. c. 121)

On the same day as Lord Kingsdown's Act became law,

6th. August 1861, another Act was passed which was intended to make a further inroad into the meshes of the law of domicil. It is a doctrine of the law's creation, which in many of its branches has grown unwieldy and unmanageable, producing results "contrary to expectation and belief".

Further modification of rule of domicil by statute.

The first object at which the Act aims is to obtain, by means of conventions, a mutual modification of the law of domicil for all purposes of testate and intestate succession, as it affects the subjects of the contracting States. It proposes to remove the question from the debateable ground of an inferred intention to the more solid ground of expressed intention, and thus to do away with the complications which the law of domicil has introduced into the law of successions. To this extent the Act endeavours to put domicil on the same footing as naturalization.

It cannot but be regretted that this part of the Act has lain dormant for over forty years. It is not of good augury for the simplification of some of the complicated doctrines of law which have grown up round residents abroad, to which some look forward. These doctrines have in this case, in the words of the preamble, led to their personal property in the event of their death being "administered in a manner contrary to their expectations and belief", and so to the defeating of their wills. There are many possible causes why the Act should have failed of achievement. It may be that its provisions are too tentative. Or, it may be that our belief that the law of domicil is one which is administered by "all civilised countries", is not well founded: for it is by no means clear that the law of "*domicile*", which is dealt with in some of the Codes, is not confused with the law of domicil, which we administer, and which if it exists in France, for example, lies altogether outside the Civil Code. Or, it may be that the fault lies in this, that the very reason why the law of domicil was invented differentiates it from the law which allows a man to change his nationality by naturalization. The object of that law might be defeated if the expression of intention were allowed to be made its basis, instead of the assumption which the law attaches to long and continued residence among a community to which a person does not naturally belong.

Possible reasons for absence of conventions under the Act.

Whatever be the cause of failure, it is singular that the same period of inaction has extinguished the vitality of another useful statute passed in the same year, also tending towards simpli-

fication of inter-national difficulties—the Foreign Law Ascertainment Act of 1861—24 & 25 Vict. c. 11.

Administration of estates of persons without representatives: Consuls to be authorised by convention.

The Act next endeavours in s. 4, to simplify the administration of estates of subjects deceased in foreign countries without legal representatives. This section recognises the principle with which we have been dealing, that a convention is necessary before acts can be authorised by our executive officers in a foreign country. Under the conventions, our consular officers are to be the acknowledged legal representatives of the personal estate of the deceased, and are to administer that estate for the benefit of all concerned, a reciprocal right being given to the consular officers of the other contracting State. The adjustment of the rights of the debtors and creditors of a person dying in a foreign country falls within the judicial powers of the Sovereign, and his sanction is obviously necessary to the legality of the acts of an administrator appointed by the law of another State, even though his functions are limited to the subjects of that State.

In England, the administrator of an estate cannot enter on his functions without a formal appointment by the Court. It would have been possible in this Act to have dispensed with this procedure, as well as with the corresponding provisions in the foreign country, which are included under the words "the same or the like powers and authorities", and to have mutually provided for the Consuls entering on their functions without formality. But it would not have been advisable to alter fundamental procedure for a small class of cases, as it would necessarily tend to confusion. There is therefore a provision that the foreign Consul shall obtain letters of administration from the proper Court in the dominions, and that the British Consul will obtain the same or the like powers from the proper foreign Court.

The decisions of the English Courts go a long way towards showing that this is a matter which would be dealt with by them in the same spirit, without conventions. Thus, in the case of the *goods of Beggia*, where a person specifically empowered by Mahomedan law to take the property of domiciled subjects of the Emperor of Morocco in case of intestacy, was held entitled to a grant of administration. The distinction between this principle and the provision of the Act, is that the Courts do no more than acknowledge the law of the domicil, the Act deals with subjects

[1 Add. 340.]

irrespective of domicil. This shows clearly the link connecting the fourth with the first section.

Article 3 of the Convention with the United States "relative to the disposal of real and personal property", is based on this section; and a special convention on this subject was entered into with Japan in April, 1900. These are, I believe, the only ones which so far have been made. [set out in Appendix to Part I.]

It will be noticed that the section uses the expression "letters of administration", but in the application of the conventions to some of the Colonies, this might give rise to difficulties; for where the maxim of succession is *le mort saisit le vif*, letters of administration are unknown, nor is there any equivalent, except what is known as *l'envoi en possession*: but this is not always required. [set out in the Appendix to this Chapter.]

In the United States convention above-mentioned, the difficulty is overcome by the following comprehensive provision –

> The said Consular Officer shall have the right to appear personally or by delegate, in all proceedings on behalf of the absent heirs or creditors, until they are otherwise represented.

This covers the cases where the heir is seized with the property, as well as those where he is not. It also covers such a law as that of Mauritius, where the rights of absent heirs or creditors are vested in an officer known as the Curator of Vacant Estates. This officer is also charged with the duty of administering vacant estates and vacant successions.

The Act is, by s. 3, not to apply to foreigners who have been naturalized in any part of the dominions.

The Act not to apply to naturalized foreigners.

It is difficult to say with any certainty what this section means; or whether, in spite of the apparent generality of its language, it really applies to all the sections of the Act. If it applies to s. 1, in so far as it relates to foreigners naturalized in the United Kingdom, it would mean that they are not to have the benefit under the conventions of determining their domicil in a foreign country in the manner provided. At the time this Act was passed, the Naturalization Act of 1844 was in force, and this section may have been regarded as a statutory limitation of the rights of naturalized persons. Since 1870, it may possibly be held that the new provisions as to the effect of the certificate of naturalization have virtually repealed this section, if the broad con-

struction prevails. But on the other hand, it fits in with the narrow construction, which limits that effect strictly to the United Kingdom, for this would be a right only to be exercised abroad. In so far as it relates to foreigners naturalized in the Colonies, it coincides with the effect accorded to colonial certificates.

[*cf.* Part I, Chapter VIII.]

[*cf.* Part I, Chapter XV.]

The same result is arrived at with regard to the application of the provision to s. 4. But in so far as it applies to s. 2, it would appear to be intended to emphasize the fact that the right intended to be conferred by the conventions on foreigners, of determining their domicil in the United Kingdom, was not to apply to foreigners who had become naturalized. The position of the section, following immediately after s. 2, seems to render this construction probable, and it would then read as if it were a part of s. 2. With regard to persons naturalized in the United Kingdom, it may perhaps be not without its use : but, as was pointed out in the first Part, this interpretation would give a larger effect to colonial certificates than the law warrants, except in so far as the convention finds its application to the circumstances of some person's death in any given Colony. It may be that this is is the meaning of the reference to colonial naturalization.

[*cf.* Part I, p. 251.]

[Dicey—"Conflict of Laws": rule 138.]

Neither of these Acts affects the law of wills of, or of succession to, realty : all rights over, or in relation to, immoveables are governed as a general rule by the law of the country where the immoveable is situate (*lex situs*).

EXTRA-TERRITORIAL OATHS AND EVIDENCE.

We come now to the important and very practical question of taking evidence abroad.

The fundamental doctrine that the King's writ does not run beyond the sea, applies as well to the sub-pœna as to the ordinary writ of summons : and, just as the difficulties with regard to service of a writ out of the jurisdiction have been overcome by special provisions contained in Order XI of the Rules of the High Court, so the difficulties in obtaining evidence from witnesses out of the jurisdiction have been met by the procedure known as taking evidence by commission. The same difficulty arises even when the witness is beyond the United Kingdom, but in the Colonies, though they are then more easily overcome. This branch of the question is dealt with by the Evidence by Commission Acts,

Evidence by commission of witnesses abroad.

1831, 1859, and 1835—1 Will. IV, c. 22 ; 22 Vict. c. 20, and 48 & 49 Vict. c. 74.

With regard to witnesses in foreign countries, the issue of commissions was authorised by s. 4 of 1 Will. IV, c. 22 : but this section was repealed by 46 & 47 Vict. c. 39 [S. L. R. Act, 1883], and the practice is now regulated by Order XXXVII of the Rules of the Supreme Court.

The practice is briefly as follows. An order for the examination of witnesses out of the dominions will be made on good cause shown, the evidence being taken *viva voce*, or by written interrogatories, either before commissioners or special examiners, who may be persons living in England or abroad.*

Letters of request to foreign Court.

Another method is to proceed by way of "letters of request" to examine the witnesses, addressed to a foreign Court under Order XXXVII rule 6*a*. Into the minor details of this procedure, as well as into that of the other Divisions of the High Court, it is not necessary to enter, as they are fully dealt with in text-books of practice. The procedure must, however, be examined from the point of view of the principles now under consideration.

Examination of principles involved.

It will be observed that the two methods of proceeding are based on diametrically opposite principles. The first assumes the power to exist in the Court—independent now of legislative sanction, since the repeal of s. 4 of the Act of William IV—to issue a commission executable in a foreign country, and to authorise the administration of an oath. It is true, that the commissioners are not invested with the power of summoning witnesses in the foreign country, and that it has the appearance of being merely a convenient piece of machinery for the collection of evidence *de bene esse* from willing witnesses ; yet it cannot but be regarded as an extra-territorial extension of the powers of the Court.

The issue of a commission in the King's name, authorising acts to be done in a foreign country, of itself raises questions which spring from the roots of the matter ; and the fact that it is not made publicly known to any other persons than those whom it may concern, cannot alter the fact that these questions make the justification of the procedure exceedingly difficult. On one question especially the answer has proved the reverse of satisfactory. The commission gives power to administer an oath to the wit-

* The procedure is fully explained in Hume-Williams and Macklin's book on Evidence by Commission, to which the author has had occasion to refer.

nesses, and this, in more than one instance, has been criticised in a most practical way by foreign Courts, for reasons to be presently considered.

The most satisfactory procedure from all points of view, practical as well as theoretical, is by way of letters of request to the Courts of the country in which the witness is residing, for not only is the difficulty of the oath got rid of, but the compulsory attendance of the witness is secured : the foreign Court in granting the request, puts its procedure at the service of the British Court, or of the party on whose behalf the request is made.

It is curious that this procedure should rest on Rules of Court,* for it would seem to be a fitting subject for legislation on the lines of the Foreign Law Ascertainment Act, 1861—24 & 25 Vict. c. 11—the question being dealt with completely by means of conventions. The fulfilment of our side of the arrangement is already on the statute book. The Foreign Tribunals Evidence Act, 1856—19 & 20 Vict. c. 113—provides for the taking of evidence in the dominions in relation to civil and commercial matters pending before foreign tribunals.

We pass now to the legislation which deals with another branch of the subject, the swearing of oaths and affidavits abroad.

Oaths and affidavits sworn abroad.

The Commissioners for Oaths Act, 1883 — 52 Vict. c. 10, amended by 54 & 55 Vict. c. 50—enacts that oaths and affidavits, required for the purposes of any Court or matter in England, may be taken by Commissioners for Oaths specially appointed by the Lord Chancellor by virtue of their commission, " in England or elsewhere ", or before certain *ex officio* " oaths officers ", or before any person having authority to administer an oath in any place out of England, according to the law of such place [s. 1].

It is obvious that the existence of the statute authorising the administration of an oath abroad, cannot differentiate the questions involved, in point of principle, from those involved in the procedure by way of commission issued by the Courts. Underlying both there is the fact that the validity of the oath rests

* And so also, it should be noted, does the practice of " Service out of the Jurisdiction ", under Order XI. The idea that the " notice in lieu of service " is innocuous to the law of sovereignty is ingenious : but the arguments on which the idea rests do not seem to be very consistent with the high principles which have been invoked in many judgments.

on the King's commission* issued for execution in a foreign country. Even supposing, which is by no means certain, that the administration of the oath is limited to British subjects, the difficulty is not avoided, and from all that has gone before, it is clear that the warrant for it is far to seek ; for the authority to administer an oath in any country can only emanate from the Sovereign. Without this authority the pretended oath is no oath at all. But the question is rendered still more difficult by the fact that the administration of an oath may be, and in some cases is, illegal according to the law of the country where the commissioner's powers have to be exercised. By the law of some foreign countries, Germany. for example, it is considered to be a contempt of Court for any but an authorised national official to administer an oath : and in a well-known case a British commissioner was imprisoned by order of Court.

Act probably extends to oaths by foreigners.

But then we come to the *ex officio* officers to whom powers are given by s. 6 of the Act. If it is unlawful in any country for persons other than national officials to administer an oath, the exterritorial privilege attaching to these British officials (assuming it to cover them all), is hardly wide enough to warrant a direct violation of the local law. The question is almost the same as that raised in connection with the official marriage officers under the Foreign Marriage Act : and it is to be observed that there is not in the Act under discussion, any similar reservation in favour of the local law. It appears that diplomatic notice has been given by certain countries as to their law on this subject : but this seems to have been with special reference to the old practice of the High Court, and it is said, led to the adoption of letters of request. The powers of the commissioners under the Act do not appear to have been limited, at least by means of any public document.

Ex officio Oaths Officers

But the giving of evidence leads inevitably to the question of false evidence, and collaterally to forgery of seals and signatures. Perjury and forgery are dealt with by ss. 7 and 8, and the trial in the United Kingdom of extra-territorial offences by s. 9. They are to be deemed to have been committed in the county where they are tried, for all purposes of trial and punishment.

cf. p. 186.

Once again the difficult question arises as to these offences

* The difficulty is not removed by the fact that the Act makes it a Lord Chancellor's commission.

Chapter VI when committed abroad. The Act is not limited in terms to British subjects, and there is nothing to show that foreigners cannot avail themselves of the services of the commissioners abroad, in cases coming within the provisions of s. 1 (2): that is to say, when the oath or affidavit is "for the purposes of any Court or matter in England, including any of the ecclesiastical Courts or jurisdictions, matters ecclesiastical, matters relating to applications for notarial faculties, and matters relating to the registration of any instrument whether under an Act of Parliament or otherwise:" or the giving of "bail or recognizance in or for the purpose of any civil proceeding in the Supreme Court, including all proceedings on the revenue side of the King's Bench Division".*

The question under this Act is not limited to a privilege granted to foreigners abroad, for it may well be that the evidence of a foreigner is required by a British subject a party to an action, and it is difficult to contend that the benefit of the Act was not intended to meet such a case. And directly the possibility of a foreigner taking an oath under the Act is admitted, it follows that the intention of the Act must be that they would come within the penal sections in respect of perjury or forgery. Under any circumstances the incriminating document could be impounded by the Court under s. 10. It will be seen that the question is precisely identical with that raised on the corresponding sections of the Foreign Marriage Act: if foreigners come within the scope of the Act and may swear an oath under it, how is it possible to contend that they are exempted from the consequences of swearing a false oath? The fact that it is optional for a foreigner to give evidence cannot affect the question, for it is doubtful whether there can be a voluntary submission to criminal jurisdiction; moreover, though it would perhaps cover the majority of cases of perjury, cases of forgery would not be affected by it.

It is submitted that the Act may be justified on the principle deduced from the Foreign Marriage Act, that the legislation is applicable to a class of persons abroad, and the intention of the Act being clearly not to exclude foreigners from its operation, they legitimately fall within its provisions. The fact that there

cf. p. 218.

* Extended by the Act of 1891—54 & 55 Vict. c. 50—to oaths and affidavits required under the Merchant Shipping Acts, the Customs Consolidation Act, 1876, the Patents, Designs and Trade Marks Acts, 1883 to 1888, and the Pawnbrokers Act, 1872, and Acts amending the same respectively.

are two such statutes, seems to lend additional force to the argument that this is a legitimate principle on which extra-territorial legislation applicable to foreigners may be based.

By s. 3 of the Act oaths and affidavits taken abroad by persons having authority by the local law to administer oaths are to be received in England. This subject is also dealt with by the Evidence Act, 1851—14 & 15 Vict. c. 99, ss. 7 and 11.

Affidavits sworn abroad before British Consuls are also receivable by the Courts in certain proceedings under the following statutes :—

15 & 16 Vict. c. 86, s. 22—Chancery Practice Act. 1852.

25 & 26 Vict. c. 89, s. 128—Companies Act, 1852.

30 & 31 Vict. c. 44, ss. 81--83—Chancery (Ireland) Act, 1867—The penalty for forgery of the signature or seal of the Consul under s. 83, and for tendering the same is in this Act probably territorial.

34 & 35 Vict. c. 49, ss. 17--19 — Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1871.

40 & 41 Vict. c. 57, s. 74—Supreme Court of Judicature Act, (Ireland) 177.

46 & 47 Vict. c. 52, s. 135—Bankruptcy Act, 1883.

APPENDIX TO CHAPTER VI.

FOREIGN MARRIAGE ACT, 1892.

55 & 56 Vict. c. 23 :—*An Act to consolidate enactments relating to to the Marriage of British Subjects outside the United Kingdom.*

Validity of marriages solemnized abroad in manner provided by Act.

1.—All marriages between parties, of whom one at least is a British subject, solemnized in the manner in this Act provided in any foreign country or place by or before a marriage officer within the meaning of this Act, shall be as valid in law as if the same had been solemnized in the United Kingdom with a due observance of all forms required by law.

Notice to marriage officer of intended marriage.

2.—In every case of marriage intended to be solemnized under this Act, one of the parties intending marriage shall sign a notice, stating the name, surname, profession, condition, and residence of each of the parties, and whether each of the parties is or is not a minor, and give the notice to the marriage officer within whose district both of the parties have had their residence not less than one week then next preceding, and the notice shall state that they have so resided.

Filing in registry and posting up of notice.

3.—(1) The marriage officer shall file every such notice, and keep it with the archives of his office, and shall also, on payment of the proper fee, forthwith enter in a book of notices to be kept by him for the purpose, and post up in some conspicuous place in his office, a true copy of every such notice, and shall keep the same so posted up during 14 consecutive days before the marriage is solemnized under the notice.

(2) The said book and copy posted up shall be open at all reasonable times, without fee, to the inspection of any person.

Requirement of like consent to marriage as in England, and power to forbid marriage.

4.—(1) The like consent shall be required to a marriage under this Act as is required by law to marriages solemnized in England.

(2) Every person whose consent to a marriage is so required may, at any time before the solemnization thereof under this Act, forbid it by writing the word "forbidden" opposite to the entry of the intended marriage in the book of notices, and by subscribing thereto his name and residence, and the character by reason of which he is authorised to forbid the marriage; and if a marriage is so forbidden the notice shall be void, and the intended marriage shall not be solemnized under that notice.

Caveat against marriages may be lodged with marriage officer.

5.—(1) Any person may on payment of the proper fee enter with the marriage officer a caveat, signed by him or on his behalf, and stating his residence and the ground of his objection against the solemnization of the marriage of any person named therein, and thereupon the marriage of that person shall not be solemnized until either the marriage officer has examined into the matter of the caveat and is satisfied that it ought not to obstruct the solemnization of the marriage, or the caveat is withdrawn by the person entering it.

(2) In a case of doubt the marriage officer may transmit a copy of the caveat, with such statement respecting it as he thinks fit, to a Secretary of State, who shall refer the same to the Registrar-General, and the Registrar-General shall give his decision thereon in writing to the Secretary of State, who shall communicate it to the marriage officer.

(3) If the marriage officer refuses to solemnize or to allow to be solemnized in his presence the marriage of any person requiring it to be solemnized, that person may appeal to a Secretary of State, who shall give the marriage officer his decision thereon.

(4) The marriage officer shall forthwith inform the parties of and shall conform to any decision given by the Registrar-General or Secretary of State.

When marriage not solemnized within 3 months a new notice required.

6.—Where a marriage is not solemnized within 3 months next after the latest of the following dates—

(*a*) the date on which the notice for it has been given to and entered by the marriage officer under this Act; or

(*b*) if on a caveat being entered a statement has been transmitted to a Secretary of State, or if an appeal has been made to a Secretary of State, then the date of the receipt from the Secretary of State of a decision directing the marriage to be solemnized,

the notice shall be void, and the intended marriage shall not be solemnized under that notice.

Oath before marriage.

7.—Before a marriage is solemnized under this Act, each of the parties intending marriage shall before the marriage

make, and subscribe in a book kept by the officer for the purpose, an oath—

(*a*) That he or she believes that there is not any impediment to the marriage by reason of kindred or alliance, or otherwise; and

(*b*) that both of the parties have for three weeks immediately preceding had their usual residence within the district of the marriage officer; and

(*c*) where either of the parties, not being a widower or widow, is under the age of twenty-one years, that the consent of the persons whose consent to the marriage is required by law has been obtained thereto, or, as the case may be, that there is no person having authority to give such consent.

Solemnization of marriage at office in presence of marriage officer and two witnesses.

8.—(1) After the expiration of fourteen days after the notice of an intended marriage has been entered under this Act, then, if no lawful impediment to the marriage is shown to the satisfaction of the marriage officer, and the marriage has not been forbidden in manner provided by this Act, the marriage may be solemnized under this Act.

(2) Every such marriage shall be solemnized at the official house of the marriage officer, with open doors, between the hours of eight in the forenoon and three in the afternoon, in the presence of two or more witnesses, and may be solemnized by another person in the presence of the marriage officer, according to the rites of the Church of England, or such other form and ceremony as the parties thereto see fit to adopt, or may, where the parties so desire, be solemnized by the marriage officer.

(3) Where such marriage is not solemnized according to the rites of the Church of England, then in some part of the ceremony, and in the presence of the marriage officer and witnesses, each of the parties shall declare —

> "I solemnly declare, that I know not of any lawful impediment why I *A.B.* [*or C.D.*] may not be joined in matrimony to *C.D.* [*or A.B.*]."

And each of the parties shall say to the other—

> "I call upon these persons here present to witness, that I *A.B.* [*or C.D.*] take thee, *C.D.* [*or A.B.*], to be my lawful wedded wife [*or* husband]."

Marriage fees to marriage officer

9.—(1) The marriage officer shall be entitled, for every marriage solemnized under this Act by him or in his presence, to have from the parties married the proper fee.

(2) He shall forthwith register in duplicate every such marriage in two marriage register books, which shall be furnished to him from time to time for that purpose by the Registrar-General (through a Secretary of State), according to the form provided by law for the registration of marriages in England, or as near to that form as the difference of the circumstances admits.

(3) The entry in each book of every such marriage shall be signed by the marriage officer, by the person solemnizing the marriage, if other than the marriage officer, by both the parties married, and by two witnesses of the marriage.

(4) All such entries shall be made in regular order from the beginning to the end of each book, and the number of the entry in each duplicate shall be the same.

(5) The marriage officer by whom or in whose presence a marriage is solemnized under this Act may ask of the parties to be married the several particulars required to be registered touching the marriage.

Annual forwarding of copies of register book to Secretary of State.

10.—(1) In January in every year every marriage officer shall make and send to a Secretary of State, to be transmitted by him to the Registrar-General, a copy, certified by him to be a true copy, of all the entries of marriages during the preceding year in the register book kept by him, and if there has been no such entry, a certificate of that fact; and every such copy shall be certified, and certificate given, under his hand and official seal.

(2) The marriage officer shall keep the duplicate marriage register books safely until they are filled, and then send one of them to a Secretary of State, to be transmitted by him to the Registrar-General.

Marriage officers and their districts.

11.—(1) For the purposes of this Act the following officers shall be marriage officers, that is to say:—

(*a*) Any officer authorized in that behalf by a Secretary of State by authority in writing under his hand (in this Act referred to as a marriage warrant); and

(*b*) any officer who, under the marriage regulations hereinafter mentioned is authorized to act as marriage officer without any marriage warrant;

and the district of a marriage officer shall be the area within which the duties of his office are exerciseable, or any such less area as is assigned by the marriage warrant or any other warrant of a Secretary of State, or is fixed by the marriage regulations.

(2) Any marriage warrant of a Secretary of State may authorize to be a marriage officer—

(*a*) A British ambassador residing in a foreign country to the government of which he is accredited, and also any officer prescribed as an officer for solemnizing marriages in the official house of such ambassador;

(*b*) the holder of the office of British consul in any foreign country or place specified in the warrant; and

(*c*) a governor, high commissioner, resident, consular or other officer, or any person appointed in pursuance of the marriage regulations to act in the place of a high commissioner or resident, and this Act shall apply with the prescribed modifications to a marriage by or before a governor, high commissioner, resident, or officer so authorized by the warrant, and in such application shall not be limited to places outside Her Majesty's dominions.

(3) If a marriage warrant refers to the office without designating the name of any particular person holding the office, then, while the warrant is in force, the person for the time being holding or acting in such office shall be a marriage officer.

(4) A Secretary of State may, by warrant under his hand, vary or revoke any marriage warrant previously issued under this Act.

(5) Where a marriage officer has no seal of his office, any reference in this Act to the official seal shall be construed to refer to any seal ordinarily used by him, if authenticated by his signature with his official name and description.

Marriages on board Her Majesty's ships on foreign stations.

12.—A marriage under this Act may be solemnized on board one of Her Majesty's ships on a foreign station, and with respect to such marriage—

(*a*) Subject to the marriage regulations a marriage warrant of a Secretary of State may authorize the commanding officer of the ship to be a marriage officer;

(*b*) the provisions of this Act shall apply with the prescribed modifications.

Avoidance of objections to marriages on account of want of formalities or authority of officer.

13.—(1) After a marriage has been solemnized under this Act it shall not be necessary, in support of the marriage, to give any proof of the residence for the time required by or in pursuance of this Act of either of the parties previous to the marriage, or of the consent of any person whose consent thereto is required by law, nor shall any evidence to prove the contrary be given in any legal proceeding touching the validity of the marriage.

(2) Where a marriage purports to have been solemnized and registered under this Act in the official house of a British ambassador or consul, or on board one of Her Majesty's ships, it shall not be necessary, in support of the marriage, to give any proof of the authority of the marriage officer by or before whom the marriage was solemnized and registered, nor shall any evidence to prove his want of authority, whether by reason of his not being a duly authorized marriage officer or of any prohibitions or restrictions under the marriage regulations or otherwise, be given in any legal proceeding touching the validity of the marriage.

Forfeiture of property in case of fraudulent marriage.

14.—If a marriage is solemnized under this Act by means of any wilfully false notice signed, or oath made by either party to the marriage, as to any matter for which a notice, or oath, is by this Act required, the Attorney-General may sue for the forfeiture of all estate and interest in any property in England accruing to the offending party by the marriage; and the proceedings thereupon, and the consequences thereof, shall be the same as are provided by law in the like case with regard to marriages solemnized in England according to the rites of the Church of England.

Punishment of false oath or notice.

15.—If a person—

(*a*) Knowingly and wilfully makes a false oath or signs a false notice, under this Act, for the purpose of procuring a marriage; or

(*b*) forbids a marriage under this Act by falsely representing himself to be a person whose consent to the marriage is required by law, knowing such representation to be false;

such person shall suffer the penalties of perjury, and may be tried in any county in England and dealt with in the same manner in all respects as if the offence had been committed in that county.

Evidence.

16.—(1) Any book, notice, or document directed by this Act to be kept by the marriage officer or in the archives of his office, shall be of such a public nature as to be admissible in evidence on its mere production from the custody of the officer.

(2) A certificate of a Secretary of State as to any house, office, chapel, or other place being, or being part of, the official house of a British ambassador or consul, shall be conclusive.

Application of Registration Acts to this Act.

17.—All the provisions and penalties of the Marriage Registration Acts, relating to any registrar, or register of marriages or certified copies thereof, shall extend to every marriage officer, and to the registers of marriages under

this Act, and to the certified copies thereof (so far as the same are applicable thereto), as if herein re-enacted and in terms made applicable to this Act, and as if every marriage officer were a registrar under the said Acts.

Registration of marriages solemnized under local law.

18.—Subject to the marriage regulations, a British consul, or person authorized to act as British consul, on being satisfied by personal attendance that a marriage between parties, of whom one at least is a British subject, has been duly solemnized in a foreign country, in accordance with the local law of the country, and on payment of the proper fee, may register the marriage in accordance with the marriage regulations as having been so solemnized, and thereupon this Act shall apply as if the marriage had been registered in pursuance of this Act, except that nothing in this Act shall affect the validity of the marriage so solemnized.

Power to refuse solemnization of marriage where marriage inconsistent with international law.

19.—A marriage officer shall not be required to solemnize a marriage, or to allow a marriage to be solemnized in his presence, if in his opinion the solemnization thereof would be inconsistent with international law or the comity of nations;

Provided that any person requiring his marriage to be solemnized shall, if the officer refuses to solemnize it or allow it to be solemnized in his presence, have the right of appeal to the Secretary of State given by this Act.

Fees.

54 & 55 Vict. c. 36.

20.—The proper fee under this Act shall be such fee as may for the time being be fixed under the Consular Salaries and Fees Act, 1891; and the fee so fixed as respects a consul shall be the fee which may be taken by any marriage officer; and the provisions relating to the levying, application, and remission of and accounting for fees under that Act shall apply to the same when taken by any marriage officer who is not a consul.

Power to make marriage regulations.

21.—(1) Her Majesty the Queen in Council may make regulations (in this Act referred to as the marriage regulations)—

(*a*) Prohibiting or restricting the exercise by marriage officers of their powers under this Act in cases where the exercise of those powers appears to Her Majesty to be inconsistent with international law or the comity of nations, or in places where sufficient facilities appear to Her Majesty to exist without the exercise of those powers, for the solemnization of marriages to which a British subject is a party; and

(*b*) determining what offices, chapels, or other places are, for the purposes of marriages under this Act, to be deemed to be part of the official house or the office of a marriage officer; and

(*c*) modifying in special cases or classes of cases the requirements of this Act as to residence and notice, so far as such modification appears to Her Majesty to be consistent with the observance of due precautions against clandestine marriages; and

(*d*) prescribing the forms to be used under this Act; and

(*e*) adapting this Act to marriages on board one of Her Majesty's ships; and to marriages by or before a governor, high commissioner, resident, or other officer, and authorizing the appointment of a person to act under this Act in the place of a high commissioner or resident; and

(*f*) determining who is to be the marriage officer for the purpose of a marriage in the official house of a British ambassador, or on board one of Her Majesty's ships, whether such officer is described in the regulations or named in pursuance thereof, and authorizing such officer to act without any marriage warrant; and

(*g*) determining the conditions under which and the mode in which marriages solemnized in accordance with the local law of a foreign country may be registered under this Act; and

(*h*) making such provisions as seem necessary or proper for carrying into effect this Act or any marriage regulations; and

(*i*) varying or revoking any marriage regulations previously made.

(2) All regulations purporting to be made in pursuance of this section may be made either generally or with reference to any particular case or class of cases, and shall be published under the authority of Her Majesty's Stationery Office, and laid before both Houses of Parliament, and deemed to be within the powers of this Act, and shall while in force have effect as if enacted by this Act.

(3) Any marriage regulations which dispense for any reason, whether residence out of the district or otherwise, with the requirements of this Act as to residence and notice, may require as a condition or consequence of the dispensation, the production of such notice, certificate, or document, and the taking of such oath, and may authorize the publication or grant of such notice, certificate, or document, and the charge of such fees as may be prescribed by the regulations; and the provisions of this Act, including those enacting punishments with reference to any false notice or oath, shall apply as if the said notice, certificate, or document were a notice, and such oath were an oath, within the meaning of those provisions.

Validity of marriages solemnized within British lines.

22.—It is hereby declared that all marriages solemnized within the British lines by any chaplain or officer or other person officiating under the orders of the commanding officer of a British army serving abroad, shall be as valid in law as if the same had been solemnized within the United Kingdom, with a due observance of all forms required by law.

Saving.

23.—Nothing in this Act shall confirm or impair or in anywise affect the validity in law of any marriage solemnized beyond the seas, otherwise than as herein provided, and this Act shall not extend to the marriage of any of the Royal family.

Definitions.

24.—In this Act, unless the context otherwise requires—

The expression "Registrar-General" means the Registrar-General of Births, Deaths, and Marriages in England:

The expression "Attorney-General" means Her Majesty's Attorney-General, or if there is no such Attorney-General, or the Attorney-General is unable or incompetent to act, Her Majesty's Solicitor-General, for England:

The expression "the Marriage Registration Acts" means the Act of the session of the sixth and seventh years of the reign of King William the Fourth, chapter eighty-six, intituled "An Act for registering Births, Deaths, and Marriages in England," and the enactments amending the same

The expression "official house of a marriage officer" means, subject to the provisions of any marriage regulations, the office at which the business of such officer is transacted, and the official house of residence of such officer, and, in the case of any officer, who is an officer for solemnizing marriages in the official house of an ambassador, means the official house of the ambassador:

The expression "consul" means a consul-general, consul, vice-consul, pro-consul, or consular agent:

The expression "ambassador" includes a minister and a chargé d'affaires:

The expression "prescribed" means prescribed by marriage regulations under this Act.

Commencement of Act.

25.—This Act shall come into operation on the first day of January next after the passing thereof.

Repeal and savings.

26.—(1) The Acts specified in the schedule to this Act are hereby repealed to the extent in the third column of that schedule mentioned.

Chapter VI

APPENDIX

Provided that—

(*a*) Any Order in Council in force under any Act so repealed shall continue in force as if made in pursuance of this Act; and

(*b*) any proceedings taken with reference to a marriage, any register book kept, and any warrant issued in pursuance of the Acts hereby repealed, shall have effect as if taken, kept, and issued in pursuance of this Act; and

(*c*) the fees which can be taken in pursuance of the Acts hereby repealed may continue to be taken in like manner as if fixed in pursuance of the Consular Salaries and Fees Act, 1891, and may be altered accordingly; and

(*d*) the forms prescribed by or in pursuance of the Acts hereby repealed may continue to be used as if prescribed by an Order in Council under this Act.

(2) Every marriage in fact solemnized and registered by or before a British consul or other marriage officer in intended pursuance of any Act hereby repealed shall, notwithstanding such repeal or any defect in the authority of the consul or the solemnization of the marriage elsewhere than at the consulate, be as valid as if the said Act had not been repealed, and the marriage had been solemnized at the consulate by or before a duly authorized consul.

Provided that this enactment shall not render valid any marriage declared invalid before the passing of this Act by any competent court, or render valid any marriage either of the parties to which has, before the passing of this Act, lawfully intermarried with any other person.

Short title.

27.—This Act may be cited as the Foreign Marriage Act, 1892.

THE WILLS ACT, 1861.

24 & 25 Vict. c. 114.

Wills made out of the Kingdom to be admitted if made according to the law of the place where made.

1.—Every will and other testamentary instrument made out of the United Kingdom by a *British* subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in *England* and *Ireland* to probate, and in *Scotland* to confirmation, if the same be made according to the forms required either by the law of the place where the same was made or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's Dominions where he had his domicile of origin.

Wills made in the Kingdom to be admitted if made according to local usage.

2.—Every will and other testamentary instrument made within the United Kingdom by any *British* subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed, and shall be admitted in *England* and *Ireland* to probate, and in *Scotland* to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

Change of domicile not to invalidate will.

3.—No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.

Nothing in this Act to invalidate wills otherwise made.

4.—Nothing in this Act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this Act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act.

Extent of Act.

5.—This Act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this Act.

COMMISSIONERS FOR OATHS ACT, 1889.

52 Vict. c. 10.

Appointment and powers of commissioners for oaths.

1.—(1) The Lord Chancellor may from time to time, by commission signed by him, appoint persons being practising solicitors or other fit and proper persons to be commissioners for oaths, and may revoke any such appointment.

(2) A commissioner for oaths may, by virtue of his commission, in England or elsewhere, administer any oath or take any affidavit for the purposes of any court or matter in England, including any of the ecclesiastical courts or jurisdictions, matters ecclesiastical, matters relating to applications for notarial faculties, and matters relating to the registration of any instrument, whether under an Act of Parliament or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the Supreme Court, including all proceedings on the revenue side of the Queen's Bench Division.

(3) Provided that a commissioner for oaths shall not exercise any

of the powers given by this section in any proceeding in which he is solicitor to any of the parties to the proceeding, or clerk to any such solicitor, or in which he is interested.

Powers of certain officers of court, &c. to administer oaths.

2.—Every person who, being an officer of or performing duties in relation to any court, is for the time being so authorized by a judge of the court, or by or in pursuance of any rules or orders regulating the procedure of the court, and every person directed to take an examination in any cause or matter in the Supreme Court, shall have authority to administer any oath or take any affidavit required for any purpose connected with his duties.

Taking of oaths out of England.

3.—(1) Any oath or affidavit required for the purpose of any court or matter in England, or for the purpose of the registration of any instrument in any part of the United Kingdom, may be taken or made in any place out of England before any person having authority to administer an oath in that place.

(2) In the case of a person having such authority otherwise than by the law of a foreign country, judicial and official notice shall be taken of his seal or signature affixed, impressed, or subscribed to or on any such oath or affidavit.

Appointment of persons to administer oaths for prize proceedings.

4.—The Lord Chancellor may, whenever it appears to him necessary to do so, authorize any person to administer oaths and take affidavits for any purpose relating to prize proceedings in the Supreme Court, whilst that person is on the high seas or out of Her Majesty's dominions, and it shall not be necessary to affix any stamp to the document by which he is so authorized.

Jurat to state where and when oath is taken.

5.—Every commissioner before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.

Powers as to oaths and notarial acts abroad.

6.—(1) Every British ambassador, envoy, minister, chargé d'affaires, and secretary of embassy or legation exercising his functions in any foreign country, and every British consul-general, consul, vice-consul, acting consul, pro-consul, and consular agent exercising his functions in any foreign place may, in that country or place, administer any oath and take any affidavit, and also do any notarial act which any notary public can do within the United Kingdom; and every oath, affidavit, and notarial act administered, sworn, or done by or before any such person shall be as effectual as if duly administered, sworn, or done by or before any lawful authority in any part of the United Kingdom.

(2) Any document purporting to have affixed, impressed, or subscribed thereon or thereto the seal and signature of any person authorized by this section to administer an oath in testimony of any oath, affidavit, or act being administered, taken, or done by or before him, shall be admitted in evidence without proof of the seal or signature being the seal or signature of that person, or of the official character of that person.

Perjury. **7.**—Whoever wilfully and corruptly swears falsely in any oath or affidavit taken or made in accordance with the provisions of this Act, shall be guilty of perjury in every case where if he had so sworn in a judicial proceeding before a court of competent jurisdiction he would be guilty of perjury.

Forgery. **8.**—Whoever forges, counterfeits, or fraudulently alters the seal or signature of any person authorized by or under this Act to administer an oath, or tenders in evidence, or otherwise uses, any affidavit having any seal or signature so forged or counterfeited or fraudulently altered, knowing the same to be forged, counterfeited, or fraudulently altered, shall be guilty of felony, and liable on conviction to penal servitude for any term not exceeding seven years and not less than five years, or to imprisonment with or without hard labour for any term not exceeding two years.

Trial of offences. **9.**—Any offence under this Act, whether committed within or without Her Majesty's dominions, may be inquired of, dealt with, tried, and punished in any county or place in the United Kingdom in which the person charged with the offence was apprehended or is in custody; and for all purposes incidental to or consequential on the trial or punishment the offence shall be deemed to have been committed in that county or place.

Impounding of documents. **10.**—Where any offence under this Act is alleged to have been committed with respect to any affidavit, a judge of any court before which the affidavit is produced may order the affidavit to be impounded and kept in such custody and for such time and on such conditions as he thinks fit.

Definitions. **11.**—In this Act, unless the context otherwise requires,—

"Oath" includes affirmation and declaration:

"Affidavit" includes affirmation, statutory or other declaration, acknowledgment, examination, and attestation or protestation of honour:

"Swear" includes affirm, declare, and protest:

"Supreme Court" means the Supreme Court of Judicature in England.

Repeal. **12.**—The enactments specified in the schedule to this Act are hereby repealed to the extent specified in that schedule.

Chapter VI

APPENDIX

Provided that this repeal shall not affect—

(*a*) Anything done or suffered under any enactment repealed by this Act; nor

(*b*) any appointment made under or authority given by or in pursuance of any enactment so repealed; nor

(*c*) any punishment incurred or to be incurred in respect of any offence committed before the commencement of this Act against any enactment so repealed; nor

(*d*) any legal proceeding for enforcing any such punishment;

and any such legal proceeding may be instituted or continued and any such punishment may be imposed as if this Act had not been passed.

Commissions issued before commencement of Act.

13.—A commissioner authorized before the commencement of this Act to administer oaths in the Supreme Court shall be deemed to be a commissioner for oaths within the meaning of this Act.

Commencement.

14.—This Act shall commence and come into operation on the first day of January one thousand eight hundred and ninety.

Short title.

15.—This Act may be cited as the Commissioners for Oaths Act, 1889.

COMMISSIONERS FOR OATHS ACT, 1891.

54 & 55 Vict. c. 50.

Affidavit, &c., may be made before commissioner at any place.

1.—Where by or under the Merchant Shipping Acts, 1854 to 1889, or the Customs Consolidation Act, 1876, or the Patents, Designs, and Trade Marks Acts, 1883 to 1888, or the Pawnbrokers Act, 1872, or Acts amending the same respectively, any oath or affidavit is required to be taken or made before any particular person or officer, whether having special authority or otherwise, and whether at any particular place, or within any specified limits or otherwise, such oath or affidavit may be taken or made before a commissioner for oaths, at any place, and shall be as effectual to all intents and purposes as if taken or made before such person or officer, and at any particular place or within specified limits.

Amendment of 52 & 53 Vict. c. 10, s. 6, as to acting consular agent.

2.—In section six of the Commissioners for Oaths Act, 1889, after the words "consular agent" shall be inserted the words "acting consul-general, acting vice-consul, and acting consular agent."

Construction and short title.

3.—This Act shall be read with the Commissioners for Oaths Act, 1889, and may be cited as the Commissioners for Oaths Act, 1891, and the Commissioners for Oaths Act, 1889, and this Act may be cited together as the Commissioners for Oaths Acts, 1889 and 1891.

Chapter VII.

The enjoyment of Territorial Rights by Subjects and Aliens abroad.

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In the chapter dealing with "Temporary Allegiance", the question how far resident foreigners may enjoy statutory and other rights was considered; and the conclusion arrived at was, that unless there is an express provision to the contrary, either by common law or statute, their position is the same as that of resident subjects. [*see* Part I, Chapter XII.]

In the previous chapter we considered certain statutes which created rights or privileges expressly for enjoyment or exercise abroad, to which the term "extra-territorial rights and privileges" was applied; and in this case the conclusion was that their enjoyment by foreigners depended on express or implied reference. We have still to deal with the ordinary territorial statutes creating territorial rights and privileges, and to consider how far they may be enjoyed by foreigners resident abroad. [*see* Chapter VI.]

The position of aliens with reference to English law.

It will thus be seen that the position of the alien with reference to English law has to be viewed from three separate aspects:

first—when he is resident, in connection with extra-territorial law:

secondly—when he is non-resident, in connection with extra-territorial law: and

thirdly—when he is non-resident, in connection with territorial law.

The relation of residence and rights.

Looking at this third question from an abstract point of view, unless residence in the United Kingdom is made a condition of the enjoyment of any given right, or unless it is so involved in its enjoyment as to be essential to it, if aliens may enjoy the right, the question of residence or non-residence would appear to be of doubtful importance. It is not resident aliens to whom the right of holding real property was granted, but aliens without qualification. An alien friend always could acquire and possess personalty, though absent from the realm.

Again, some rights can only be exercised by residents. The alien is obviously excluded where the right is expressly granted

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to subjects : but in the absence of such an express grant, the alien who fulfils the conditions of residence should be entitled to enjoy the right. Thus the franchises depend on residence, but they are granted exclusively to subjects. So, the ownership of shares of British ships by bodies corporate, depends not only on the corporation having its principal place of business in some part of the dominions, but also on its being established under and subject to the law of some part of the dominions.

cf. Part I, p. 170.

On the other hand, there are some statutes in which the rights granted are expressly extended to foreigners. Thus, the Dentists Act, 1878, makes residence the condition for registration under it ; but s. 7 provides that a person resident in the United Kingdom shall not be disqualified from being registered "by reason that he is not a British subject ". Yet again, the Patents, Designs, and Trade Marks Act, 1896, does not make residence a condition for obtaining a patent in the United Kingdom, but by s. 4, the right is granted expressly to foreigners as well as British subjects.

cf. Part I, p. 184.

The necessity for residence by aliens examined.

It must not, however, be assumed from the fact that express references to foreigners are occasionally to be found, that such a reference is essential to the enjoyment of the right by a foreigner. That is the question to be examined in the present chapter, and it may be stated thus :—In the absence of express provision in the Act itself, does residence *per se* make any difference as between British subjects an aliens in the application of the Act ? This question may be put in still more familiar form :— Is what is called " temporary allegiance " the essential condition to the enjoyment of a right by an alien, where the law is silent on the subject ?

The enjoyment of a right is, however, often made subject to the fulfilment of a condition, other than residence, though residence may be the express or necessary result of fulfilling the condition. This is clearly a variation of the principal question ; and still looking at it from an abstract point of view, if the condition does not involve residence, but only territorial fulfilment of it, there seems to be no reason why foreigners should be excluded from the enjoyment of the right if they fulfil the condition—for example, registration in the case of copyright. Here, however, we get on to the debated ground, covered to a certain extent by authority, but unfortunately by authority which is divided against itself.

The question is more far reaching than at first sight appears, more especially in connection with statutes granting rights on the face of them territorial, but to the exercise of which no territorial or other formality is prescribed or can be inferred as essential?

Take, for instance, the Married Women's Property Act, 1882; there are no territorial words in it, nor does it require any formality to be fulfilled before the rights it creates can be enjoyed. The question might possibly arise how far married women, non-resident foreigners, may avail themselves of its provisions. So far as their property abroad is concerned, the answer is of course in the negative: but what of their property in the United Kingdom? and what of the rights which other persons, who come within its territorial application, have against the separate estate of married women created by the Act?

If the law in the case where there is a formality to be fulfilled is uncertain, it must be doubly uncertain where there is no formality to be fulfilled.

Common law rights.

Passing from statutory to common law rights, the same principles must apply, and the same uncertainly must prevail: for common law rules are as capable of being expressed with as much precision of language as statutory rules, and there can be no reason why any different principle should govern their enjoyment by aliens. An instance of express exclusion may be found in the rule, that if any right (*query*, which does not depend on statute) may be enjoyed by aliens, they must be alien friends.

The question which most commonly arises with regard to common law rights corresponds with the last question which has been suggested in connection with statutory rights: namely, as to the operation of rights which are *ex facie* territorial, and to the exercise of which no territorial or other formality or condition is attached. This question also lies within the area of debateable ground, and is to a certain extent dealt with in the same authorities, which we must now proceed to examine.

They deal with the law of copyright. The questions involved have been elaborately argued in two cases in the House of Lords, and although it necessitates diverging somewhat into the details of this law, these judgments must be examined at some length: for the question how far a non-resident foreigner can obtain copyright in England, can only be a concrete example to which

general principles must be applied, and these cases are practically our only guide.

The copyright cases examined.

The difficulty in dealing with these authorities is how to keep the fundamental principles separate from the law to which they were applied. The reports of both cases are of great length ; and the principle, the law, and the facts, are much mixed together : it will be convenient therefore to give extracts, as brief as possible, from the different judgments, and afterwards to discuss the doctrines enunciated in them.

IEFFRYS v. BOOSEY [4 H.L.C. 814 : 10 ENGL. REP. 681.]

The facts.

The question, which was decided by the House of Lords in 1854, arose under the Copyright Act of Anne [8 An. c. 19] ; it was whether a foreigner actually resident abroad could, by first publishing his book in England, obtain an English copyright. Unfortunately the facts did not allow the question to be put in so simple a form, for the work was composed by Bellini in Milan : and though it had not been published there, it was inevitable that the subject of copyright at common law should enter into the discussion. The case was further complicated by a question of transfer, and the form in which such a transfer should have been made. The opinions of the Judges were taken : six were of opinion that Bellini had a copyright transferable and effectively transferred, four that he had not. The Lords were unanimous, that as he was a non-resident foreigner, he could not have the benefit of the Act.

The decision.

The following is in brief the substance of the decision. A statute conferring rights must be construed to confer them only on British subjects : it may confer them on these subjects when they are abroad, because of their " natural allegiance " which they cannot shake off : it does also confer them on foreigners who are resident in the kingdom, because of their " temporary allegiance ". Further, and in the instance, the Act dealt with publication only, not, for very good reasons, with composition. Therefore, although a work might have been composed abroad, yet it might be copyrightable in England if published here : and " publication " means that it must be first "published" here, therefore must be first printed here : and then " would it not necessarily and naturally follow that the man himself should be here to superintend that publication ?"

So far as principle is concerned all the old doctrines which we have discussed at such great length, are to be found firmly embedded in the judgments, and Broom's maxim figures largely in them. And with regard to the application of the principle to the law of copyright, the argument contained a *non-sequitur* in practice at every stage of it: publication here does not in fact require printing here, and even if it did in law, printing here does not require the author's continued residence near the presses. So far as the Act applies at each of these stages, the necessity for printing here can only be derived from the reading into it of the protective doctrine which Mr. Justice Bayley expounded in *Clementi* v. *Walker*:—

Jefferys v. *Boosey*.

[2 B. & C. 201; 10 Engl. Rep. at p. 748.]

The intention of the Legislature was that "by confining the privilege to British printing, the employment of British capital, workmen, and materials would be employed and the work would be within the reach of the British public:" whereas "by extending the privilege to foreign printing, the employment of British capital, workmen, and materials, might be superseded, and the work might never find its way to the British public." The supposed necessity for the auther's presence, besides being untrue in fact, is a *petitio principii* in law, for that is the very point in issue.

The following extracts from the judgment will make the decision clear so far as the principle involved is concerned.

Lord Cranworth, C.

"The statute enacts that "the author of any book which shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book for the term of fourteen years, to commence from the day of the first publishing the same and no longer... The substantial question is, whether, under the term "author" we are to understand the Legislature as referring to British authors only, or to have contemplated all authors of every nation. My opinion is that the statute must be construed as referring to British authors only. *Prima facie* the Legislature of this country must be taken to make laws for its own subjects exclusively, and where, as in the statute now under consideration, an exclusive privilege is given to a particular class at the expense of the rest of Her Majesty's subjects, the object of giving hat privilege must be taken to have been a national object, and the privileged class to be confined to that portion of the community for the general advantage of which the enactment is made. When I say that

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the Legislature must *prima facie* be taken to legislate only for its own subjects, I must be taken to include under the word " subjects " all persons who are within the Queen's dominions, and who thus owe her a temporary allegiance. I do not doubt but that a foreigner resident here and composing and publishing a book here, is an author within the meaning of the statute ; he is within its words and spirit. I go further ; I think that if a foreigner, having composed but not having published a work abroad, were to come to this country, and the week or a day after his arrival were to print and publish it here, he would be within the protection of the statute. This would be so if he had composed the work after his arrival in this country, and I do not think any question can be raised as to when and where he composed it.

" If publication, which is (so to say) the overt act establishing authorship, takes place here, the author is then a British author wherever he may in fact have composed his work. But if at the time when copyright commences by publication the foreign auther is not in this country, he is not in my opinion a person whose interests the statute was meant to protect ".

Lord Brougham.

Generally we must assume that the Legislature confines its enactments to its own subjects over whom it has authority, and to whom it owes a duty in return for their obedience. Nothing is more clear than that it may also extend its provisions to foreigners in certain cases, and may without express words make it appear that such is the intendment of those provisions. But the presumption is rather against the extension, and the proof of it is rather upon those who would maintain such to be the meaning of the enactments.

Lord St. Leonards.

"What possible right can Bellini or any other person claiming under him have at common law in this country to the exclusive right of publishing a composition made by Bellini abroad ? If Bellini comes to this country and owing even a temporary allegiance to the Sovereign acquires the legal rights which belong to every subject, that of course one can understand : but what right in this country can exist in a foreigner like Bellini composing abroad and residing abroad but sending his composition here simply for publication ? Where is the right ? The common law cannot extend to a foreigner resident abroad, and owing no allegiance to this country. The claim of such a right is distinguishable from any case that has been cited or which can be cited, which gives a right to a foreigner with regard to damage done to his character for example, by a person resident in this country : the cases are alto-

gether distinct. This is a right of property which is claimed within this realm, and that right of property cannot be claimed under the common law by a foreigner who owes no allegiance to this country, and who has never acquired any property or any other right in respect of residence here, by any Act of Parliament or otherwise, to make him a subject of this realm. I am therefore clearly of opinion that whatever may be the view which might be taken as to the common law right, that right never can be held to extend to a foreigner situated as Bellini is.

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"The question then comes of course upon the statutes. I think we may fairly consider that it ought not to be denied that speaking generally an Act of our own Parliament having a municipal operation cannot be held to extend *prima facie* beyond our own subjects. It is not that an Act of Parliament may not, like the common law itself, extend its benefits to foreigners who come here and acquire that which it has been the policy of this country to give them: namely, the rights in a great measure of natural-born subjects... I venture to represent to your Lordships that it is quite clear as an abstract proposition that an Act of Parliament of this country having within its view a municipal operation, having as in this particular case a territorial operation, and being therefore limited to the Kingdom, cannot be considered to provide for foreigners except as both statute and common law do provide for foreigners when they become resident here, and owe at least a temporary allegiance to the Sovereign, and thereby acquire rights just as other persons do: not because they are foreigners, but because being here they are entitled in so far as they do not break in upon certain rules, to the general benefit of the law for the protection of their property in the same way as if they were natural-born subjects.

"If this Act of Parliament extends to foreigners generally, then there is no reason why they should not publish here while they reside abroad.

"It seems not to denied that an English author may reside abroad and yet have his rights as an English author upon publication here. Why? Because he owes a natural allegiance which he cannot shake off. Residence abroad (although he may thereby have come under some new obligations, or have acquire some new rights) will not relieve him from his natural allegiance: he cannot be relieved from it by any foreign country, and therefore be carries with him the natural rights of a subject of England wherever he goes. That gives him, though resident abroad, the right to publish here, because he has always fulfilled the implied condition of being a subject of, and owing allegiance to the Crown of Great Britain. That could not of course be said of any foreigner who was not actually resident here.

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" ... then there being no common law right, it would be a new right given by Act of Parliament and the foreigner must bring himself within the terms of that Act of Parliament in order to enjoy it : and to do so in my apprehension he must be able to predicate to himself that he is the subject of these realms at least for the time being.

" ... then in order to obtain copyright here he must come and perform as I have already shown, the condition annexed to the enjoyment of that right : and I held it to be perfectly clear that that condition is that he must reside in the country ".

Some principle must evidently lie at the root of such a question, and the principle which the Lords adopted does not want for clearness or emphasis of statement. If the case stood by itself the boldness of attacking it would be great. But it has been questioned in no unmistaken terms in the second case.

Routledge v. *Lowe.*

Routledge v. Lowe arose in somewhat similar circumstances under the statute of Victoria which repealed the statute of Anne, and some copyright questions were put on a surer footing. But the fundamental question of principle gave rise to divergent opinions on the part of the Law Lords, and was left in a state of most unstable equilibrium : two of them differing from what had been previously laid down, but the others declining to accept the proposed new principle.

ROUTLEDGE v. *LOWE* [L. R. 3 H. L. 100.]

The facts.

The book called " Haunted Hearts " was written by Miss Cummins, a domiciled citizen of the United States. Before publication she resided in Montreal for a few days, during which time the book was published in London by the assignees of the copyright, Messrs. Lowe. Shortly afterwards Messrs. Routledge published in London a cheap edition, and an action for infringement of copyright was brought, which went on appeal to the House of Lords. The case is complicated by the introduction of a new element, residence in a Colony while publication, though not printing, was taking place in England : and the question was whether an alien friend could, during such temporary sojourn within the realm, obtain copyright in England within the meaning of the statute of 1845, by which a new area of protection had been introduced.

The decision.

On two points the Lords were unanimous : first, as to the place of publication—that it was the United Kingdom and not the Colonies : secondly, as to the area of protection—that it was

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the dominions and not merely the United Kingdom. Then comes the all-important question—Who are the persons entitled to the protection? To this we find a most uncertain answer, as to the general principle: though in the special case there was not much difficulty, for Miss Cummins was an alien friend within the area of protection, and therefore entitled to the benefit of the statute on fulfilling its conditions. Lord Cairns expressed his opinion that the protection is given to every author who publishes in the United Kingdom, wheresoever that author may be resident, or to whatever country he may be subject. This is obviously the negation of the principle laid down in the previous case, and some of the Lords declined to accept it: while those who did found some difficulty in framing their argument consistently with the respect due to a decision of the House. In view of the fact that precisely the same fundamental question was in issue, it is difficult to follow the reasoning which put the former decision entirely on the construction of the statute of Anne: and in view of the fact that that fundamental question is of such great importance, it is much to be regretted that the traditions of the House did not permit a further and complete examination of it.*

As in the former case, I now set out some of the more important paragraphs of the judgments.

Lord Cairns, C.

"The aim of the Legislature is to increase the common stock of the literature of the country, and if that stock can be increased by the publication here for the first time of a new and valuable work composed by an alien, who never has been in the country, I see nothing in the wording of the Act which prevents, nothing in the policy of the Act which should prevent, and everything in the professed object of the Act, and in its wide and general provisions which should entitle, such a person to the protection of the Act, in return and compensation for the addition he has made to the literature of the country.

The decision of the House in *Jefferys* v. *Boosey* "must be taken to be the construction and effect of the statute of Anne. But it is impossible not to see that the *ratio decidendi* in that case proceeded mainly, if not

* There can be very little doubt that the fundamental question was in fact raised in *Jefferys* v. *Boosey*, and that the vexed question involved in the law of copyright may be eliminated from the arguments. It is true that Lord Cranworth described the Act of Anne as a statute creating an exclusive privilege given to a particular class at the expence of the rest of Her Majesty's subjects: but if the case were to be thus limited it might be dropped out of consideration, as indeed Lord Westbury did in fact drop it. It is submitted that the principles laid down in the case were general and not special.

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exclusively, on the wording of the preamble of the statute of Anne, and on a consideration of the general character and scope of the legislation of Great Britain at that period. The present statute has repealed that Act, and professes to aim at affording greater encouragement to the production of literary works of lasting benefit to the world. And accepting the decision of this House as to the construction of the statute of Anne, it is I think impossible not to see that the present statute would be incompatible with a policy so narrow as that expressed in the statute of Anne."

Lord Cranworth.

In concurring with the Lord Chancellor "I must guard myself against being taken as assenting to the suggestion that the Act now regulating copyright must be taken as extending its privileges to all authors, aliens as well as natural-born subjects, who publish their works for the first time in this country. It is not necessary to come to any such conclusion in order to support the decree appealed from.

"I think it a reasonable inference from the provisions of the Act that its benefits are conferred on all persons resident in any part of Her Majesty's dominions, whether aliens or natural-born subjects who, while so resident, first publish their works in the United Kingdom. This was the case of Miss Cummins and it is not necessary to say whether it extends farther; though there seem to me to be reasons irresistible for thinking that it does not. She was a foreigner resident at Montreal, and while so resident she published her work in London, which was its first publication—and that was I think sufficient to entitle her to the protection of the statute.

"I find it difficult to concur in the opinion that the present statute extends its protection to all foreigners wherever they may be resident, without saying that the case of *Jefferys* v. *Boosey* is not good law—a conclusion at which I should be very unwilling to come as to any case decided in this House, more especially as to one so elaborately considered as that of *Jefferys* v. *Boosey*. That case was decided, not on the construction of the Act of the 5 & 6 Vict. c. 45, but on the old statute of Queen Anne: but I own I do not as at present advised, see any difference between the two statutes so far as relates to the subject of the residence of foreign authors."

Lord Chelmsford.

"Copyright under the statute of Anne was confined to Great Britain. Therefore under that statute in order to qualify himself to claim a copyright for any work which he had composed but not published abroad, a foreigner must, at the time of its first publication, have been resident

within some part of the area over which copyright extended, and to which it was limited.

The 29th " section of the Act requires for its full effect that the area over which the copyrights prevail should be limited only by the extent of the British dominions. But then it will follow that the term " author", though intended to express a British subject, would apply to a foreigner taking up his residence within the limits to which copyright extended under the 8 Anne. And those limits being now enlarged by the 5 & 6 Victoria, the residence which confers the rights of a British subject as to copyright upon a foreigner may be in any part of the Queen's dominions. It was admitted in the argument that a resident native of Canada would be entitled to the benefit of an English copyright. What reason is there for denying to a foreigner resident in Canada the privileges in this respect of a native Canadian.

" I cannot help entertaining a doubt whether " the opinion of the Lord Chancellor " is well founded. If any stress is to be laid upon the preamble of the statute it does not appear to me to differ very widely from that in the statute of Anne... If therefore the statute of Anne did not confer the privilege of copyright upon an alien publisher (which after the case of *Jefferys* v. *Boosey* it must be taken not to have done) I cannot find anything in the 5 & 6 Victoria which appears to me to warrant the extension of its benefits to such a publisher ".

Lord Westbury.

" The case of *Jefferys* v. *Boosey* is a decision which is attached to and depends on the particular statute of which it is the exponent ; and as that statute has been repealed and is now replaced by another Act, with different enactments expressed in different language, the case of *Jefferys* v. *Boosey* is not a binding authority in the exposition of this later statute,

" It is proposed to construe the Act (5 & 6 Victoria) as if it had declared in terms that the protection it affords shall extend to such authors only as are natural-born subjects, or if foreigners who may be within the allegiance of the Queen on the day of publication. But there is no such enactment in express terms and no part of the Act has been pointed out as requiring that such a construction should be adopted... The preamble is in my opinion quite inconsistent with the conclusion that the protection given by the statute was intended to be confined to the works of British authors. On the countrary it seems to contain an invitation to men of learning in every country to make the United Kingdom the place of first publication of their works : and an extended term of copyright throughout the whole of the British dominions is the reward of their so doing. So interpreted and applied the Act is auxillary to the advance-

Routledge v. *Lowe.*

ment of learning in this country. The real condition of obtaining its advantages is the first publication by the author of his work in the United Kingdom. Nothing renders necessary his bodily presence here at the time, and I find it impossible to discover any reason why it should be required, or what it can add to the merit of the first publication.

"If the intrinsic merits of the reasoning on which *Jefferys* v. *Boosey* was decided be considered (and which we are at liberty to do for it does not apply to the case as a binding authority) I must frankly admit that it by no means commands my assent. I abstain from criticising the arguments in detail, for the process could hardly be consistent with the great respect due to judicial opinions delivered by your Lordships.

"The sum of the whole reasonning is the conclusion that a British statute must be considered as legislation for British subjects only, unless there are special grounds for inferring that the statute was intended to have a wider operation.

"But by the common law of England the alien friend, *ami*, though remaining abroad, may acquire and hold in England all kinds of pure personal property, and when a statute is passed which creates or gives peculiar protection to a particular kind of property, and does not exclude the alien, why is he to be deprived of his ordinary right of possessing such property and being entitled to such protection?"

Lord Colonsay declined to express an opinion on the liberal interpretation of the statute which had been suggested, in view of the difference of opinion which had been expressed with regard to it, and also in view of the fact that it was unnecessary to determine it.

With all the respect which is the due of so august a tribunal, it cannot but be matter of regret that the fundamental principle was not gone into as elaborately as the question of copyright, which cannot be other than a particular instance of the application of the principle. If copyright were, as it was treated even by Lord Cairns, a reward for the production of learned books, instead of being what it is, a benefit conferred on the authors of good and bad alike, this treatment of the case would have found more warrant. As it is, we have two leading cases dealing with the same basis of facts, and the principle laid down in the first case as applicable to them criticised by Lord Cairns in the second case, and Lord Cairns' criticism itself criticised by Lord Cranworth. The actual point in issue is now of little consequence, for the case of foreign authors has been amply provided for by subsequent legislation: but the fundamental principle is important, and what the Lords did not do must be attempted, and an

examination of the cases treated as uncertain at the beginning of this chapter must now be made. Chapter VII

Unless this be permitted, the gradual evolution of the common law becomes an impossibility : and if there is no such gradual evolution, the common law loses the chief of its many virtues. In such a process it is inevitable that doctrines should be advanced which seem to go to the utmost confines of thought, but which, in the course of time, are left far behind, become antiquated, and must be abandoned as useless and hindering progress. The exalted position of the Court in which they were first formulated should not make any difference, lest the Court itself become a stumbling block in the process of evolution. These two decisions hold their place in the gradual evolution of a subject rom the clouds by which it has always been much obscured. There can be no disrespect in the suggestion that a re-examination of the principles laid down is necessary, for they appear, on the face of them, to be as obsolete as some of the conditions which were considered to be necessary to the production of books, at the time the judgments were given.

Language of civil and criminal la[illegible] co[illegible]

The language used for conferring rights differs inevitably from that used for imposing duties. In the latter case the intended area of incidence of the duty is presumably in the mind of the legislator : in the former case, except in a few instances already considered, no more intention on the subject can be implied than that those who are entitled to the right by law should enjoy it. For comparison, it will be useful to put the enacting words of civil and criminal legislation into the same formula : thus—

criminal :—

If any person does— (e.g. *wilful damage to his neighbour's property*)—he shall be guilty of an offence.

civil :—

If any person does— (e.g. *registers his book at Stationers' Hall and pay the fee*)—he shall be entitled to a right.

This question is whether "any person" is to receive the same interpretation in the civil as in the criminal provision : in other words, whether it is to be limited to persons within the jurisdiction.

The application of both civil and criminal provisions of this nature is based on the same fact, the occurrence of some act within the jurisdiction. The localization of the person in the jurisdiction

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as well as the act, in criminal matters, results not merely from the maxim "all crime is local", but from the fact that, under normal circumstances, the actor is at the place in which he commits the act. But in the case of civil acts the presence of the actor on the spot is often not essential, and therefore the same localization of the person in the jurisdiction ceases to be essential. It does not follow, because presence within the kingdom is necessary to the consequences resulting from the commission of of a criminal act—trial and infliction of punishment—that such presence is also necessary to the consequences resulting from the performance of a civil act—the coming into existence of a right.

cf. p. 66.

Putting all questions of constructive presence within the jurisdiction on one side, if there were any special consequences, apart from trial, resulting from a criminal act, which might still result although the act were committed abroad—as, for example, loss of civil rights—there can be no doubt that they would attach, and that the person who had committed the act would be debarred from the further exercise of any rights he possessed in the kingdom. The concrete criminal example is difficult to imagine, as hypothesis has been stretched to the utmost; but it is not difficult to understand that a man beyond the jurisdiction may possess a civil right within it. It is still easier to understand when the law makes the possession of the right dependent on the performance of some formality within the jurisdiction, and which may be performed without the necessity for actual presence.*

The application of the common law to foreigners considered.

Once the fundamental difficulty is removed with regard to the localization of the person in the jurisdiction, it is removed for aliens as well as for subjects. The existence of the right being dependent on the perfomance of the required act within the jurisdiction, and being independent of residence, it must also be independent of the nationality of the person performing it.

The common law side of the question was dismissed by Lord St. Leonards as irrelevant to the discussion:—"The common law cannot extend to a foreigner resident abroad—the right of a foreigner with regard to damage done to his character, for example, by a person resident in this country is altogether distinct." But

* By letter or by agent. If the proposition laid down in *Jefferys* v. *Boosey* is sound, the registration of the copyright by an agent would not bring the author within the realm, and so within the law—*qui facit per alium facit per se* finding no application.

is it so? and is it true to say that the case cited is not an illustration of the fact that the common law, in so far as it is possible, does apply to a non-resident foreigner? This question is not a little complicated by the broad rule as to the right of access to the English Courts, which is free to the extreme point, and almost without let or hindrance. The right to bring actions in England for wrongs committed abroad is, on the face of it, a recognition and enforcement of the foreign law on which the action is based; and the fact that a non-resident foreigner may sue a resident foreigner for a slander said in France, is an argument which goes some way to show that protection is not the basis of our law. The fact that actions may be brought by non-resident foreigners for wrongs committed in England, might also be said to result from the fact that the Courts are free. But is it sound to ignore the operation of the English common law on which such actions must in fact be based? For example, a libel in an English newspaper on a Frenchman in France is actionable in England. Here the tort is committed in England, and, if the common law did not extend to foreigners, this would be a good defence to the action. The case may give rise to a scintilla of doubt as to whether publication in France is necessary, but it clearly does not come within the same category as actions for torts committed abroad. Or, a Frenchman resident in France has bought a race horse in England, and it is injured owing to the negligence of some person in England. Again the tort is committed in England, and, if the common law did not apply to foreigners abroad, again there would be a good defence to the action. This case gives rise to no doubt. Or again, a Frenchman resident in France owns land in England. It is certain that he can recover damages in England for trespass to his land, and that the common law would support his action, although he has never set foot in England.

Of course the common law is territorial in its application: and of course the broad principle must be that foreigners abroad do not come within the scope of its benefits. But circumstances may occur which will entitle them to those benefits. The cases cited are typical of the multitude of such circumstances, and it is submitted that they are the result of a subordinate but definite principle, and are not merely exceptions to the general rule.

Further, if in any of these cases the right in question depend-

ed on statute instead of the common law, it cannot be admitted that this could make any difference; for both the common law and the statute law are strictly territorial in their application, and the subordinate principle applicable to the common law from its nature must also be applicable to statute law.

The application of certain territorial statutes to foreigners examined.

We have still to determine what this subordinate principle is: and for this purpose as must examine a few statutes giving rights, but which, containing no provision as to the area of their application, are purely territorial.

26 & 27 Vict. c. 73.

First, let us consider the operation of such a statute as the India Stock Certificate Act, 1863, by which facilities are given to the holders of India Stock in respect of its transfer and the receipt of the dividends. It cannot be questioned that non-resident foreigners, holders of India Stock, are entitled to avail themselves of the facilities for obtaining certificates of title. This statute is of special interest in the discussion as, although a non-resident foreigner may obtain the benefit of the Act, yet he would not be liable, under s. 13, for receiving or endevouring to receive abroad a certificate of title under the Act by means of personation. Such a case is obviously different from the extra-territorial operation of the penal clauses of the Foreign Marriage Act, considered in the last chapter.

cf. p. 214.

Again, take the Settled Estates Act, or the Settled Lands Act, it is hardly to be doubted that their provisions would apply to cases where some of the parties interested were non-resident foreigners, nor that such persons could avail themselves of the benefits of the Acts in cases of estates or settled lands to which they were applicable. The Act in the first case, and the Rules under the Act in the second, expressly contemplate the fact that parties affected by the decision of the Court may be abroad: but these provisions for proceeding in absence relate to the parties affected, and are equivalent to the creation of jurisdiction over them: they do not however affect the question of foreigners abroad availing themselves of the provisions of the Acts.

Hypothetical case under the Married Women's Property Act examined.

Passing to the question which has already been suggested with reference to the operation of the Married Women's Property Act, it is probable that we have crossed the line, and come to a right-conferring statute whose territorial provisions could not apply to non-resident foreigners. Yet even here it is by no means certain that its non-application is not due rather to the

interference of other principles of law: for it is difficult to imagine a case in which the contention that the Act applied to a married woman under such circumstances would not be decided adversely by reference to the law of domicil, or the law of nationality, to the maxim *mobilia sequuntur personam*, or to the law of the marriage contract. Yet suppose such a case as the following - A married woman, American and residing in the United States, but carrying on the trade of horse dealing in England separately from her husband [s. 1, *v*], and recovering damages in an action in the English Courts for damage to a horse belonging to her, which damages would, if the Act applies, be her separate property [s. 1, *ii*]. If she afterwards became bankrupt [s. 1, *v*], it might conceivably be contended that this provision had been inserted not merely for the benefit of the married woman, but also for the benefit of her English creditors, and that the fact of her being a foreigner abroad should make no difference.

Further examination of a case under the Married Women's Property Act.

I do not profess even to suggest an affirmative answer to the question; it is a hypothetical case which will serve to indicate the extreme limit of complexity and difficulty of the subject. Nor is it necessary to extend the examination of individual statutes any further. We have enough before us to warrant the application to the statute law of what we have already said with regard to the common law—Of course the statute law is territorial in its normal application: and of course the broad principle must be that foreigners abroad do not come within the scope of its benefits. But circumstances may occur which should entitle them to those benefits. The cases cited are typical of the multitude of such circumstances, and it is submitted that they also are the result of a definite, though subordinate, principle, and are not merely exceptions to the general rule.

In the case of land and settled estates, the reason on the surface why the statutes should extend to foreigners abroad, is the maxim *lex loci rei sitæ*. But in the case of personalty, such as stock, this maxim does not apply, but rather the opposite. But in the consideration of the question before us, neither the one maxim nor the other has any place. The familiar maxims are mainly concerned with the subject of jurisdiction. No question of jurisdiction is involved in the question whether, under certain circumstances, any given person can avail himself of the benefits of a statute. Jurisdiction sometimes relates to the thing,

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sometimes to the person, varying according to the place where either may be at the time ; but the application of a statute, in so far as it is impersonal, would seem rather to be influenced by the locality of the thing affected by it : and this whether it be realty or personalty. And what is true of corporeal things must be equally true of incorporeal things. It is clear that the same rule applies to personalty as to realty : to stock as to land : it seems equally clear that it also extends to copyright, to patents, and to other incorporeal rights.

Reverting to the concrete case of copyright, the conditions of the enjoyment of the right are publication and registration in England. Now, of course, if the Act had expressly provided in its scheduled forms that a declaration of nationality and residence were essential, if these had not been furnished the clerk at Stationers Hall would have refused to register, and so the conditions would have remained unfulfilled, and there could be no copyright. But there was no such preliminary impediment to registration, any more than there was to publication : we have in the instance, therefore, only a simple example of the acquisition of a right by a non-resident foreigner who has fulfilled the conditions attached by the law to such acquisition. The principle advocated by Lords Cairns and Westbury is, therefore, only the concrete example of a wider rule.

Suggested rule of construction.

This argument brings us to the subordinate principle ; it shows that the strict interpretation of the form " any person " must suffer another modification. It is suggested that in the case of statutes creating territorial rights subject to the fulfilment of a condition, the rule with regard to their enjoyment by persons abroad is, that " any person " means "any person who fulfils the territorial condition" on which the existence of the right depends

There still remain those statutes creating territorial rights, but to the enjoyment of which no condition is attached. The few cases already examined show how difficult it is to formulate any general rule.

It must not be overlooked, however, that we start the enquiry with two admissions. The first general—that when residence is a condition of the enjoyment of any right, the enjoyment is independent of nationality. The second concrete—that in the case of the right granted to aliens to hold land, the enjoyment is independent of residence. It would seem to follow that when neither

nationality nor residence is made the condition of the enjoyment of a right in the United Kingdom, that enjoyment must also be independent of either.

Statutes creating rights without condition considered.

The temptation is great to enunciate a general principle in a form such as the following—In the absence of express provision or limitation, a right created by statute, relating to some matter or thing within the territory, may be enjoyed by subject and alien alike: and if it is capable of enjoyment by persons abroad, may still be enjoyed by both alike, so long as the formalities, if any, required by the statute are fulfilled.

The fact that a condition is attached to the enjoyment of the right would make the case all the stronger; but, after all, the existence of the condition with its necessary fulfilment within the territory, would only be a variation of the main principle that the subject matter of the statute should be within the area to which the statute applies. A more prolonged examination of the subject than has been possible in this chapter, would be necessary before such a general proposition could be definitely suggested. In the present state of the question a general rule could only be formulated after a study of its effect in concrete cases. But the statutes already examined show that it is possible to formulate one further rule of construction.

cf. p. 218.

In the case of statutes creating extra-territorial rights abroad, the rule suggested for interpreting the form "any person" was, that it meant "any person who comes within the class" to whom the right is granted. So here, in the case of statutes creating territorial rights, it seems essential to adopt the same rule with regard to their enjoyment by persons abroad—that the right must be held to be granted to any person who comes within the class, irrespective of residence or nationality.

Suggested rule of construction.

Conclusion.

The conclusions come to in this and the preceding chapter are, that to the rules of interpretation given at the commencement of the fourth chapter the following must be added –

cf. p. 162.

"Any person" when used in statutes conferring rights subject to the fulfilment of a condition, and when there are no special words of limitation, means any person irrespective of nationality who fulfils the condition – which may be residence, or the performance of any act, territorial or otherwise. And when used in statutes relating to a class, territorial or otherwise, "any

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person " means, in the absence of any special words of limitation, any person who comes within the class, irrespective of nationality, and irrespective also of residence.

Chapter VIII.

The Extra-territorial effect of the Law of Bankruptcy.

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In the law of bankruptcy we find legislation essentially territorial in its nature, but containing certain extra-territorial provisions ; an extension which has been necessitated by the ever-increasing cosmopolitan character of our trade. But although the reason for the legislation lies on the surface, and the necessity is as fully justified as in any other case, the consequent problems to which it gives rise are the most troublesome in the whole range of inter-national legal relations, and appear to be the most insoluble. To establish bankruptcy jurisdiction over a trader within the realm is part of a commercial system—if it should extend to foreigners so trading its necessity is so apparent : if it should be further extended to non-resident foreigners so trading its justification appears so easy, that it is difficult to realise that there is more than one side to the question. But then comes the hard fact that the jurisdiction, when created, is of little use without recognition by the Courts of other countries, where the property which is wanted for the creditors may be. Bankruptcy is a question of status, and the laws of status are entitled to universal recognition : but other nations are not as yet quite willing to accord to this special status the full recognition of its consequences so far as property is concerned. Into this branch of the question I do not propose to go, for it has been discussed by many writers. The scope of this chapter will be merely to trace the principles of extra-territorial legislation in their application to the question of bankruptcy.

Commercial necessity for bankruptcy jurisdiction over foreigners trading in England.

32 & 33 Vict. c. 71. 46 & 47 Vict. c. 52. [*see* the Appendix to this Chapter.]

The question depends on the construction to be put on ss. 4 and 6 of the Bankruptcy Act, 1883, which deal with the question of jurisdiction.

The first of these sections corresponds with s. 6 of the Act of 1869, but s. 6 is a new provision.

The superficial meaning of these sections seems to be the

The elements of bankruptcy jurisdiction.

following. By s. 4, certain acts are defined to be acts of bankruptcy when committed by "a debtor". The familiar question then arises — what debtors are included in this term? If there were no other restriction, the answer must be the same in this as in other cases: it must apply to all persons, subjects and aliens, who are debtors within the area of the application of the law.

But the persons against whom a petition may be presented are expressly defined, by s. 6 (1) (*d*), to be those who are domiciled or within the previous year have ordinarily resided, or have had a dwelling house or place of business in England. The usual area of application of the law appears to vanish, and to be replaced by certain personal considerations.

But again, the jurisdiction does not arise until the "act of bankruptcy" is committed; some of these acts may be committed "in England or elsewhere", and one of them consists in the mere fact of being and remaining abroad.

It is clear that foreigners might be included in each of the compenent parts of this jurisdiction, and in some instances non-resident foreigners. But all the conditions combined must be fulfilled before the jurisdiction can be exercised, and this applies to subjects and foreigners alike. It is inevitable that the questions which arise in connection with foreigners should be exceedingly complex, and that the application of familiar principles must be very difficult.

Lastly, clause (*d*) of s. 6 suggests that there is a further jurisdiction in respect of acts which are not personal, but which are committed through the instrumentality of an agent; for a petition may be presented against a debtor who has had a "place of business" in England: and there is no indication that this place of business may not be carried on by a managing agent on behalf of a non-resident owner.

The law is contained in four or five leading cases which I propose to examine seriatim. Two of them were decided under the Act of 1869, and it is important to bear in mind that the condition of s. 6 (1) (*d*) did not then exist: the question of jurisdiction had then to be determined by ordinary principles, and must be discussed as at the time of the decision.

Ex parte CRISPIN, re CRISPIN [L.R. 8 Ch. 374].

Examination of the leading cases

The case arose under the Act of 1869, the alleged acts of bankruptcy having been committed by a Portuguese subject, a non-trader not domiciled in England ; they were the same as those specified in the two parts of clause (*d*) of s. 4 of the Act of 1883.

The reference to the debtor being a non-trader was made, because in s. 6 of the Act of 1869 there were provisions specially applicable to traders : thus, it was an act of bankruptcy for a trader to depart from his dwelling-house, or otherwise to absent himself : but for a non-trader the corresponding act was beginning to keep house. These distinctions have disappeared in the Act of 1883.

The questions are twofold : Can such a foreigner be made bankrupt, first in consequence of acts of bankruptcy committed by him in England ; and secondly, in consequence of acts committed abroad, which fall within the meaning of the term " act of bankruptcy "? In the case, the acts were

(*a*) departing out of England with intent to defeat and delay his creditors : and,

(*b*) being out of England, thereafter remaining out of England with the like intent.

In the first place, there being no special conditions with regard to jurisdiction, the general rule must apply. Foreigners who commit acts of bankruptcy during their residence must be subject to the bankruptcy law. When a law deals with the consequences of an act, it cannot make any difference in principle whether it deals with it by the bankruptcy law or by the criminal law.

But that by no means implies that the whole of the Bankruptcy Act applies to foreigners, even though they are resident in the kingdom, nor that all the acts which are deemed to be acts of bankruptcy apply to them. Some of these acts may be, in fact, are, extra-territorial in their nature, and the very reason which makes some of them applicable to resident foreigners, or to be more exact, foreigners who have been resident, may make others inapplicable to them. It may well be that departing out of England is an act of bankruptcy applicable to foreigners who were in the kingdom up to the time of their departure : but to remain out of England after having departed, even with intent to delay creditors in England, is an act committed abroad ; and therefore the part of the Act which deals with this is extra-territorial, and must be interpreted according to the rules applicable

Extra-territorial acts of bankruptcy.

to other extra-territorial legislation. In the case, the Court held that the departing had not been with intent to delay the creditors; and that the remaining abroad, following as it did the act of departing, which was innocent from the bankruptcy point of view, could not of itself be an act of bankruptcy. These, as well as one other act of bankruptcy to be considered presently, are dealt with in Lord Justice Mellish's judgment.

"We agree that the word 'debtor' must be construed to mean 'debtor properly subject to the laws of England': but we are of opinion that it is the act of bankruptcy and not the petition which gives jurisdiction to the Court of Bankruptcy, and that if a foreigner comes to England and contracts debts in England, and commits an act of bankruptcy in England he thereby gives the Court of Bankruptcy jurisdiction over him.

"If a foreign trader trades in England and commits an act of bankruptcy in England he is subject to the bankruptcy laws, and it makes no difference that he is not a resident trader in England, or that his principle place of business is elsewhere, and he may be made bankrupt upon an act of bankruptcy which consists in departing from England with intent to defeat and delay his creditors. We are of opinion however that a foreigner not domiciled in England, and not carrying on trade in England, who quits England without having committed an act of bankruptcy cannot be made a bankrupt upon an alleged act of bankruptcy committed out of England. We think that the Legislature cannot have intended to enact that if a foreigner who is not subject to the laws of England does something in his own country, which may be perfectly lawful and innocent by the laws of that country, the effect should be that his property should be vested in a trustee in England for the benefit of his creditors.

"Then we think that a consideration of the particular acts which are made acts of bankruptcy when committed out of England will confirm this conclusion. The first is 'that the debtor has in England or elsewhere made a conveyance or assignment of his property to a trustee for the benefit of his creditors generally'. This seems clearly intended to relate to a conveyance which is to operate according to English law, which a conveyance executed by a domiciled Englishman although out of England may do: but a conveyance executed by a domiciled foreigner in his own country must necessarily operate according to the foreign law, and we think it was never intended that such a conveyance should be an act of bankruptcy. The second is 'that the debtor has in England or elsewhere made a fraudulent conveyance &c. of his property or any part thereof'. This clearly means and has always been interpreted as meaning fraudulent by the law of England, and therefore cannot pro-

perly apply to a conveyance which is executed in and is to operate according to the law of a foreign country. The third is now in question. 'That the debtor with intent to defeat or delay his creditors, has, being out of England, remained out of England'. We think these words imply that the person who remains out of England, has his home or place of business in England and cannot reasonably be held to apply to the case of a foreigner remaining in his own home."

Relation back of trustee's title to property abroad.

One extra-territorial provision of the law must be specially considered. The title of the trustee relates back to the act of bankruptcy, and the property of the bankrupt is transferred to the trustee. This includes, according to the policy of the Act, property wherever situate and whenever acquired, which may have been acquired and be still abroad, although the act of bankruptcy may have no relation to this property. This is the inevitable consequence of bankruptcy : and the Court held that there was " no good reason why this consequence should not follow in the case of a foreigner " who is subject to the laws of England while he is here.

Ex parte BLAIN, re SAWERS [L. R. 12 Ch. D. 522.]

In this case also decided under the Act of 1869, seven persons constituted the firm of Sawers and Co. trading in London and Liverpool, and also under another style at Valparaiso and other places in South America. Two of the partners were Chilians domiciled and resident in Chili, and had never been in England. An action was brought against the firm in the Queen's Bench Division, the writ being served on Sawers in Liverpool : this was followed by judgment and levy, and this being alleged to be an act of bankruptcy, a petition was filed against all the members of the firm. The two Chilians appeared under protest and asked to have the order for service discharged. The Court of Appeal decided in their favour.

Bankruptcy of a firm to be treated as bankruptcy of a series of individuals.

The key to the decision is to be found in the judgment of Brett L.J.—

" I am of opinion that a firm as such cannot commit an act of bankruptcy. An act of bankruptcy must be the personal act or the personal default of the person who is to be made a bankrupt."

The firm therefore, for the purposes of the Bankruptcy Act, must be split up into its component personal elements, and the law as to jurisdiction applied to each. This being done, the case falls within the general principle of *Crispin's case* with regard to

each partner. A few extracts only from the judgments referring to general principles will be necessary.

Ex parte BLAIN.

"It appears to me that the whole question is governed by the broad general universal principle that English legislation, unless the contrary is expressly enacted, or so plainly implied as to make it the duty of an English Court to give effect to an English statute, is applicable only to English subjects or to foreigners who by coming into this country whether for a long or short time, have made themselves during that time subject to English jurisdiction...It is not consistent with ordinary principles of justice or the comity of nations that the Legislature of one country should call on the subject of another country to appear before its tribunals when he has never been within their jurisdiction. Of course if a foreigner has come into this country and has committed an act of bankruptcy here, he is liable to the consequences of what he has done here: but in the absence of express legislative provision compelling me to say that the Legislature has done that which in my opinion would be violation of international law, I respectfully decline to hold that it has done anything of the kind." [James L. J.]

"I think it must be obvious that the word 'debtor' must receive some qualification, because we find in the second sub-section 'that the debtor has in England or elsewhere made a fraudulent conveyance or transfer of his property.' The act there specified as giving the Court the right to adjudicate the person doing it a bankrupt, may have been done not only in England but elsewhere: and unless we put some limit on the word 'debtor', it will come to this that any man who has never been in England, a subject of a foreign State, can be made a bankrupt in England, because in a foreign State he has done a certain act." [Cotton L.J.]

These two decisions put the law of bankruptcy on a level, so far as jurisdiction is concerned, with the standards of the criminal law, and it could not be otherwise in the absence of any express clause defining the jurisdiction. The enunciation of general principles is perhaps even more emphatic than usual: and in one part of his judgment James L. J. stretches his argument to an extent which, with deference, seems hardly warranted. After stating that a foreigner in England, even for a limited time, is subject to all its laws, he continues—

"But if a foreigner remains abroad, if he has never come into this country at all, it seems to me impossible to imagine that the English Legislature can ever have intended to make such a man subject to particular legislation. English legislation has said that if a debtor allows his goods to be taken in execution certain consequences shall follow, and

English legislation has a right to say that with regard to an English subject. But what right has it to say so with regard to a Chilian ? "

Ex parte BLAIN.

Then follows a reference to, and a justification of, the law as to jurisdiction against foreigners absent from the country in civil cases, in the matter of making or breaking contracts, followed by execution against the property of such foreigners :—

" But that is because the property is within the protection and subject to the power of the English law."

Jurisdiction in bankruptcy and in contracts compared.

But to this must be added "although the contract has no relation to that property". With the greatest respect for so eminent a Judge, it must be said that if an analogy between the law of jurisdiction in bankruptcy, and the law of jurisdiction in the case of contracts, is to be established, it would justify a much more extended application of the law of bankruptcy to non-resident foreigners than the Act of 1869 in fact established. For, if it is legitimate to enact with regard to contracts made in England that certain consequences shall follow from the breach of them, affecting property in no way connected with the contract and irrespective of residence and nationality, it cannot be said to be illegitimate to enact with regard to trading in England, that certain consequences shall follow a breach of the ordinary rules of trading, the sanction of which is the application of the law of bankruptcy ; even though this application involves an assignment to the trustee for the benefit of the creditors, of property in no way connected with the trading, and is also in the same way irrespective of residence and nationality.

This criticism does not go to the decision, but only to the general remarks as to the extent of the right of Parliament to legislate for foreigners abroad. Moreover, it does not profess to do more than indicate the extent to which bankruptcy jurisdiction might go, if it were to be put on the same basis as the jurisdiction in civil suits arising out of contracts. Whether the two subjects should be put on the same basis is another question.

In re PEARSON ex parte PEARSON. [L. R, 1892, 2 Q. B.]

This case stands next in order of importance, as it carries the principles of the former cases over the bridge, so to speak, between the Acts of 1869 and 1883. The facts were the same as in *Crispin's case* : and the first point decided was, that the principles which had been laid down with regard to s. 6 of the old Act

were to be continued in their application to s. 4 of the new Act, with which it is practically identical. But in this Act a new section had been introduced—s. 6, which defines the conditions under which a creditor may file a petition. The question was to determine the effect of these conditions? Do they amplify, or do they modify the jurisdiction which results from the construction of s. 4 by itself? Lord Esher M. R. explained the joint operation of the two sections thus:—

In re *PEARSON.*

The new condition as to jurisdiction created by the Act of 1883.

"Section 4 states affirmatively what are to be acts of bankruptcy. Section 6 is a negative section, and it does not in my opinion affect in any way the construction of section 4. Unless a case can be brought within section 4 it is not necessary to look at section 6. If the case is brought within section 4, and the debtor is a foreigner, it must also be brought within section 6. But if the case is not within section 4 there is nothing in section 6 which can bring it within the jurisdiction of the Court. Section 6 is only negative."

and Fry L. J. added:—

"We are asked to say that in any case to which the negative words of that clause [s. 6] do not apply the Court has jurisdiction. I think such a conclusion would be monstrous. The negative words of section 6 do not imply that in every case to which they do not apply the law of bankruptcy applies. They only import that in some cases to which they do not apply the bankruptcy law may apply...In my opinion section 4 must be interpreted according to the principles of law to which I have referred, and section 6 does not import any intention on the part of the Legislature to extend its legislation beyond the ordinary subjects of the country".

The argument which this case disposed of was, that if a person should be domiciled, or within the previous year have ordinarily resided or have had a dwelling house or place of business in England, he would fall within the application of the Bankruptcy Act. Such a construction of s. 6 (1) *(d)* would manifestly include foreigners; but it would involve the application of s. 6 before s. 4, and would also ignore the limitation conveyed by the word "unless". Moreover "the debtor" referred to in the clause is clearly a debtor as defined in s. 4.

We then have to consider the application of s. 4, and it is here that the decision assumes its importance. The section must be interpreted according to fundamental rules; "a debtor" must be interpreted in the same way as "any person", and must, therefore, be limited to debtors within the kingdom. In other words, the

In re PEARSON.

Court of Appeal perpetuated under the Act of 1883, the principle which had been laid down in *Crispin's case*, under the Act of 1869. The result of the decision is that a foreign debtor within the kingdom may be made bankrupt if he commits an act of bankruptcy, and if, but not unless, he fulfils either of the conditions of domicil, or ordinary residence, or is the possessor of a dwelling house or a place of business in England. There is the further condition, that the petition cannot be presented unless the debt falls within clauses (*a*) and (*b*) of s. 6 (1) ; nor, by clause (*c*), unless the act of bankruptcy has occurred within three months of the presentation of the petition.

Conditions under which a foreigner may be made bankrupt.

There is in this decision a manifest restriction of the ordinary rule governing the application of statutes to all persons in the kingdom irrespective of nationality. It constitutes the fundamental distinction between the new Act and the old ; for it will be seen from Lord Justice James' judgment, that the application of the Act of 1869 to foreigners, was determined solely by reference to the fact whether they were in the kingdom or not. The decision also disposes of the possibility, in the case of foreigners, of the conditions in clause (*d*) being fulfilled in spite of residence abroad, which the statement of them seems to imply. The bankruptcy jurisdiction over foreigners does not depend on domicil or ordinary residence ; but on domicil coupled with residence, or on usual coupled with actual residence, at the time the act of bankruptcy is committed. The condition relating to the place of business in England will be considered presently.

British subjects.

The clause must also find its application to British subjects. Applying the ordinary principles of construction, the Act will apply to non-resident subjects in so far as it professes to be extra-territorial. Therefore, they may be made bankrupt although non-resident, if the conditions of clause (*d*) are fulfilled.

Acts of bankruptcy committed "elsewhere" not applicable to foreigners.

But there is another extra-territorial provision which has to be considered. The acts of bankruptcy dealt with in clauses (*a*), (*b*) and (*c*) of s. 4 (1) may be committed "in England or elsewhere". The conditions under which the jurisdiction may be exercised against foreigners being what they are, it follows that the commission of one of these acts of bankruptcy by a foreigner elsewhere than in England is not contemplated : and that this provision relates only to British subjects. The interpretation of s. 4 is therefore precisely the same as that of the law relating to

bigamy, in which the words " or elsewhere " are used ; and it is an interpretation which would be arrived at if there were no other provision but as to jurisdiction in the Act.

cf. p. 118.

We must now consider the several acts of bankruptcy in their extra-territorial aspect, by the light of the early decisions already referred to.

Acts of bankruptcy which are extra-territorial in their nature examined.

The simplest cases are those dealt with in clause (*d*) of s. 6; the first relates to the debtor " departing out of England with intent to defeat and delay his creditors ". If the jurisdiction be once established over a resident foreigner, it would manifestly be reduced to a nullity, if, by merely leaving the country, the debtor could prevent that jurisdiction from being exercised. But when we come to the second case, being out of England and so remaining with the like intent, the tie of the bankruptcy jurisdiction has been broken before the act in question has been committed. The intent which the bankruptcy law takes account of is that of defeating or delaying creditors, and the act which must be committed with intent is the remaining, and not the going, out of England. The case may therefore be dealt with in the usual way ; it is an extra-territorial provision, and as such only applicable to British subjects, there being no intention discoverable in the law to extend it to foreigners. This coincides with the decision in *Crispin's case*.

Going or remaining out of England.

The remaining acts dealt with by clause (*d*) are, if the debtor " departs from his dwelling house or otherwise absents himself, or begins to keep house ". These being acts the commission of which is contemplated within the jurisdiction, they are applicable to resident foreign debtors.

Acts committed abroad which are operative in England.

The other clauses of s. 4 (1) deal with the following acts by a debtor :—

(*a*) making a conveyance or assignment of property to a trustee for the benefit of his creditors :

(*b*) making a fraudulent conveyance, gift, delivery or transfer of property :

(*c*) making a conveyance or transfer of, or creating a charge on, property, which would be void as a fraudulent preference if he were adjudged bankrupt ;

All of these constitute acts of bankruptcy, if committed " in England or elsewhere ".

Under the ordinary rule, these provisions would not apply

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when the act is committed by a foreigner elsewhere than in England. But in the early cases it was admitted that they would apply if the conveyance was intended to operate according to English law: or if such a conveyance was fraudulent by English law. If a conveyance or transfer or other document, is intended to, or does operate in England, is is this fact of which the law of bankruptcy takes cognizance; it is the result of the deed, and not the mere making of the deed, which the law treats as an act of bankruptcy. If, therefore, such a deed could be executed abroad by means of an agent, by a foreigner who fulfils other essential conditions, it would be an act of bankruptcy. Perhaps also, if such a deed were executed abroad by a foreigner domiciled or ordinarily resident in England immediately after departing out of England, it would be held, if not to amount to an act of bankruptcy, at least to be evidence of his intent to defeat or delay his creditors. It would seem, however, that such a deed executed in England by a foreigner ordinarily resident in England but domiciled abroad, which would operate according to the law of his domicil, would not amount to an act of bankruptcy.

Service of bankruptcy notice abroad.

In all probability the same principles would apply to the extra-territorial provisions in clause (*g*) of s. 4, which allows the service of a bankruptcy notice by a judgment creditor elsewhere than in England, by leave of the Court. The service would not be allowed in the case of a non-resident foreigner, except, possibly, where there had been a departure out of England in order to avoid service.

†[On appeal from *in re* A.B. & Co.; L. R. 1900, 1 Q.B. 541.]

COOKE v. *CHARLES A. VOGELER Co.* [L. R. 1901, A. C. 102.]†

The facts of this case were as follows. The Company was a firm composed of two American subjects, residing and trading at Baltimore, U.S.; they carried on a branch in England where they had assets, under the direction of a manager, but never resided in England. In 1899, they executed in Baltimore a deed of assignment of all their property to one Dulaney, their American manager, in trust to pay their debts. Dulaney wrote to the English manager instructing him not to pay certain creditors, among them Cooke in England, who thereupon presented a petition for a receiving order against the firm, alleging that they had committed acts of bankruptcy: namely, (*i*) by giving notice that they had suspended or were about to suspend payment of their debts—[s. 4 (i) (*h*)]—and (*ii*), by making an

assignment of their property for the benefit of their creditors generally—[s. 4 (i) (*a*)].

Legal effect of the facts.

In the appreciation of the case the facts are most important, and their legal effect was explained by Lord Davey in the following manner.

With regard to the notice given to Cooke, there was no evidence of any direct authority from the firm to Dulaney to give the instructions which he gave to the English manager, or to give any notice to the effect alleged: they must, therefore, be taken to have been given by him as assignee of the business and property, and not as agent for the firm: therefore there was no act of bankruptcy such as is contemplated by s. 4 (i) (*h*).

So far, therefore, as the bare facts were concerned, the case did not fall within the meaning of the law. It might almost have been put, as it was in fact put in *Blain's case*, that the act of bankruptcy must be a personal act of the debtor: it can no more be committed by an unauthorised agent than it can be by a firm of which the absent debtor is a member. But the doctrine enunciated in *Crispin's case*, that the conveyance or the transfer of, or the charge created on, the debtor's property must be such as to operate according to the law of England, also applied to the case: for the assignment was executed in Baltimore, and was intended to have effect according to the law of Maryland, and not according to the law of England. There was, therefore, no act of bankruptcy such as is contemplated by s. 4 (i) (*a*).

The case was treated by the House of Lords as concluded by authority, the previous cases being approved and followed; it is hardly necessary, therefore, to give any extracts from the judgments on the general question. There is, however, an important paragraph in Lord Davey's judgment which shows the true limits of the decision, which is not to be taken as establishing the broad principle that there is no jurisdiction at all over non-resident foreigners. Lord Davey admitted that, under certain circumstances, they might come under the bankruptcy jurisdiction

Possibility of jurisdiction arising over non-resident foreigners.

"Assuming (as I think is the fact) that the Court has a limited jurisdiction over foreigners residing abroad but trading in this country, there is no provision in the Act which purports to alter, or has the effect of altering, the law as to the conditions on which or the limits within which that jurisdiction should be exercised. If therefore (as I also think) one of the conditions and limitations on the exercise of bankruptcy jurisdiction against a foreigner domiciled and resident abroad is that the

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acts relied on must have been done by the bankrupt within the jurisdiction, or at any rate (which is sufficient for the present purpose) if the execution of an assignment of his property in his own country is not an act of bankruptcy within the meaning of the statute—if that be so, I say the jurisdiction has never arisen."

cf. p. 267.

This takes us back to Lord Justice Mellish's judgment in *Crispin's case,* in which he said—

"If a foreign trader trades in England, and commits an act of bankruptcy in England, he is subject to the bankruptcy laws, and it makes no difference that he is not a resident trader in England."

From the series of negative propositions with which these cases abound, we pass now to a positive proposition which is of the utmost importance to commerce: the exercise of bankruptcy jurisdiction against absent foreign persons or firms, who carry on their business within the jurisdiction by a managing agent.

It may be taken, therefore, as established by authority that, both under the Act of 1869, and that of 1883, absent foreigners trading in England may, certain conditions being fulfilled, be within the bankruptcy jurisdiction.

The position is as follows. The condition in s. 6 (*d*) of having a place of business in England might apply to the case of a foreign trader trading in England, but for the decision in *Pearson's case* that a foreign debtor must be within the jurisdiction for s. 4 to apply to him; but he is not within the jurisdiction. The exercise of jurisdiction generally over absent foreigners through their agents is a question which has not been worked out very thoroughly in English law, but in the case of bankruptcy such a jurisdiction would seem to exist, though it is not created in express terms by the Act. The absent foreigner is held to be present at his branch business through his agent, and so to come within the meaning of "a debtor" in s. 4. But, even then, he can only be subject to the law if he comes within the conditions which the interpretation of that law has established. This constructive residence cannot be more effective than actual residence: in both cases the limitative conditions of s. 6 (*d*) must be satisfied. Further it is clear, that, as the jurisdiction is to be exercised against the principal and not the agent, the conditions must be fulfilled by the principal and not by the agent. The domicil or the ordinary residence of the agent is immaterial. But with regard to the principal, it is not impossible for the condi-

The case put by Lord Davey analysed.

tions of domicil or ordinary residence, or possession of a dwelling-house within the year previous to the presentation of the petition, may co-exist with actual non-residence ; in which case, although only present through his agent, the jurisdiction would be established.

The important condition under the circumstances is that which relates to having a place of business in England ; for that condition is, on the hypothesis, now satisfied. But this would seem at once to lead to the conclusion that bankruptcy jurisdiction does, after all, extend over non-resident foreigners who have a place of business, that is, who trade in England : a conclusion, not only directly the opposite of the rule in *Pearson's case*, but which would also lead to the inevitable inference, that, as the foreigner is abroad, the acts of bankruptcy which may be committed " elsewhere than in England " may be committed by him.

Case in which non-resident foreigners may be made bankrupt.

It is clear, however, that as the foreigner is regarded as being in England, only those acts of bankruptcy which may be committed by a resident foreigner, as already indicated, are applicable to the present case. And not only that, those only can apply which can be committed by the agent on behalf of, and by authority from, the principal : those which can only be committed by the debtor personally are inapplicable. The departing out of England by the agent, even with intent to defeat or delay the creditors of the business, could not be construed as an act of bankruptcy by the absent principal. But many of the acts referred to in clauses (*a*) (*b*) and (*c*) might well be performed by the agent within the jurisdiction, or rather might be performed by him so as to operate in England, with authority of the principal. And it is submitted that these are the cases to which Lord Davey referred, in which bankruptcy jurisdiction may be exercised against a non-resident foreigner trader in England.

Traders.

Firms.

So far as foreign firms are concerned, the same rule would apply with reference to each of the individual partners.

Non-traders.

Lastly, it is to be observed that there is no express reference to traders in s. 6, but only to the fact of a debtor having a place of business in England. But this of itself is a negative and not a positive enactment. It becomes operative by virtue of the law of agency. It may well be that the same principle might bring even absent non-trading foreigners within the scope of the bankruptcy

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jurisdiction, where, under strictly analogous circumstances, they had committed an act of bankruptcy within the jurisdiction by means of an agent.

APPENDIX TO CHAPTER VIII.

BANKRUPTCY ACT, 1869.

32 & 33 Vict. c. 71, s. 6 :—

Petition for adjudication in bankruptcy.

6.—A single creditor, or two or more creditors if the debt due to such single creditor, or the aggregate amount of debts due to such several creditors, from any debtor, amount to a sum of not less than £50, may present a petition to the Court, praying that the debtor be adjudged a bankrupt, and alleging as the ground for such adjudication any one or more of the following acts or defaults, herein-after deemed to be and included under the expression "acts of bankruptcy :"

(1) That the debtor has, in England or elsewhere, made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally :

(2) That the debtor has, in England or elsewhere, made a fraudulent conveyance, gift, delivery, or transfer of his property or of any part thereof :

(3) That the debtor has, with intent to defeat or delay his creditors, done any of the following things, namely, departed out of England, or being out of England remained out of England ; or being a trader departed from his dwelling house, or otherwise absented himself ; or begun to keep house ; or suffered himself to be outlawed :

(4) That the debtor has filed in the prescribed manner in the Court a declaration admitting his inability to pay his debts :

(5) That execution issued against the debtor on any legal process for the purpose of obtaining payment of not less than £50 has in the case of a trader been levied by seizure and sale of his goods :

(6) That the creditor presenting the petition has served in the prescribed manner on the debtor a debtor's summons requiring the debtor to pay a sum due, of an amount of not less than £50, and the debtor being a trader has for the space of seven days, or not being a trader has for the space of three weeks, succeeding the service of such summons, neglected to pay such sum, or to secure or compound for the same.

But no person shall be adjudged a bankrupt on any of the above grounds unless the act of bankruptcy on which the adjudication is grounded has occurred within six months before the presentation of the petition for adjudication ;

... ...

BANKRUPTCY ACT, 1883.

46 & 47 Vict. c. 52, ss. 4, 6 :—

Acts of bankruptcy.

4.—(1) A debtor commits an act of bankruptcy in each of the following cases :—

(a) if in England or elsewhere he makes a conveyance or assign-

ment of his property to a trustee or trustees for the benefit of his creditors generally :

(b) if in England or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property, or of any part thereof :

(c) if in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt :

(d) if with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his dwelling house, or otherwise absents himself, or begins to keep house :

[*para. (e), rep.* 53 & 54 Vict. c. 71, s. 29.]

(f) if he files in the Court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself ;

(g) if a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after the service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counterclaim set off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained :

(h) if the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.

(2) A bankruptcy notice under this Act shall be in the prescribed form, and shall state the consequences of non-compliance therewith and shall be served in the prescribed manner

Conditions on which creditor may petition.

6.—(1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless,

(a) the debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors, exceeds £ 50, and

(b) the debt is a liquidated sum, payable either immediately or at some certain future time, and

(c) the act of bankruptcy on which the petition is grounded has occured within three months before the presentation of the petition, and

(d) the debtor is domiciled in England, or, within a year before the date of the presentation of the petition has ordinarily resided or had a dwelling house or place of business in England.

... ...

Chapter IX

Sea-Fishery Legislation.

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Sea-fishery laws constitute a special branch of extra-territorial legislation, which is of great importance to maritime States, and of great interest ; as, although in many cases it is based upon the territorial waters, in others it discards them altogether. It varies too with the nature of the fishery ; in some instances being merely concerned with ordinary sea-fishery, in others it deals with deep-sea fisheries, and with those whose grounds are the bed of the sea. This legislation has already been referred to in the previous pages, and the admitted justification for its disregard of ordinary principles has been pointed out. It now remains to consider the law of the United Kingdom on the subject.

[*cf.* Part I, Chapter II, p. 25.]

There is, in the first place, general legislation applicable to the whole of the British Islands: and there is also special legislation for each part of the kingdom. These different laws have some features in common, but they do not by any means correspond ; and in some particulars the laws of one part of the kingdom, are much more complete than in the others. It will not be necessary for our purpose to make a prolonged enquiry into the nature of sea-fishery offences, nor into many of the details of the sea-fishery laws. The examination of them will be limited to questions which are intimately connected with jurisdiction : that is—the extent of the exclusive fishery limits : the jurisdiction exercised within those limits : the jurisdiction exercised beyond those limits : the means by which it is exercised. We shall take first in order the law as it affects the British Islands generally ; afterwards the law applicable to England and Wales, to Ireland and to Scotland, and lastly the law which deals with certain colonial fisheries.

THE FISHERY LAWS OF THE BRITISH ISLANDS.

Although the Sea-Fishery Acts are now general, they first sprang from, and now, though in a limited degree, depend on, conventions entered into, first, with France, and afterwards with the countries bordering on the North Sea.

The conventions with France, and the Acts which confirm

them as they appear on the statute-book, are very complicated, owing to the fact that the convention of 1867, which was to have taken the place of that of 1839, has never been put in force. The result of this is that the confirming Act—the Sea-Fisheries Act, 1868—is in a great measure a dead letter, and it has been found necessary to partially revive the Act of 1843, which confirmed the "Regulations for the guidance of fishermen" made to carry out the convention of 1839.

In the legislative history of the Act of 1843—6 & 7 Vict. c 79—is involved the history of the general sea-fishery legislation of the United Kingdom.

Legislative history of Sea Fisheries Act of 1843.

First: the Act was passed to put in force the Regulations referred to above, which are incorporated in the schedule; and power was taken to do what was necessary to give effect to them so far as Great Britain was concerned.

Secondly: the Act was repealed by the Act of 1868—31 & 32 Vict. c. 45 which incorporated in a schedule the convention of 1867, and made certain general provisions for British sea-fishing boats, and the protection of the "exclusive fishery limits of the British Islands", then for the first time created.

Thirdly: in 1877, it would appear as if all hope of putting the convention in force had been abandoned, as advantage was taken of the purely domestic Fisheries (Oysters, Crabs and Lobsters) Act of that year—40 & 41 Vict. c. 42, s. 15—to revive the Act of 1843, "so far as regards French fishermen and French sea-fishing boats", as to which it was to continue to be in force as if it had not been repealed, until the convention of 1867 should come into operation. As regards British fishermen and boats, the general provisions which were contained in the Act of 1868 continued in force.

[*see* the note in Vol. III "Statutory Rules and Orders": p. 238.]

Fourthly: in 1883, another Sea Fisheries Act was passed—46 & 47 Vict. c. 22—confirming the Hague Convention, which regulated the fisheries of the North Sea, and also making considerable amendments in the general law as to sea fisheries. The Act of 1843 was continued temporarily and repealed prospectively. By s. 24 it is to continue in force so far as regards French sea-fishing boats and persons belonging thereto within the seas to which the convention of 1837 applies [that is, the seas lying between the coasts of Great Britain and France], so far as they are outside the exclusive fishery limits of the British Islands [as defined in

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the Act of 1883], and are not within the North Sea [as defined in the Hague Convention]. The Act is to be repealed when the Act of 1883 is applied to any convention made between Great Britain and France, in substitution for either the convention of 1867, or that of 1839.

Fifthly: the convention of 1867 has never been put in force. The convention of 1839 is therefore still operative, and also the Act of 1843, to the extent indicated in the preceding paragraph.

It will be noticed that there is a slight variation in the terms in which the Act of 1843 was continued by the Acts of 1883 and of 1877; in the earlier Act, it was "as regards French fishermen and French sea-fishing boats", in the later Act, it was "as regards French sea-fishing boats and persons belonging thereto* ". Further, if the sea limits given in the two conventions are compared, it will be noticed that they overlap on a small portion of the sea lying between a line drawn from Cape Gris Nez to the South Foreland, and a line drawn from the North Foreland to Dunquerque. France was a party to the Hague Convention; this small area is, therefore, withdrawn from the operation of the early convention and Act.

*[*see* the note on p. 283.]

Present operation of Act of 1843.

The law, so far as the Act of 1843 is now concerned, leaves untouched—

i. The exclusive fishery limits of the British Islands.

ii. The North Sea

iii. Sea-fishing boats, other than French, outside these two limits.

The Hague Convention — "for the purpose of regulating the police of the fisheries in the North Sea outside territorial waters"—was made between Great Britain, Germany, Belgium, Denmark, France, and the Netherlands, with provision for the subsequent adherence of Sweden and Norway.

The fishery law, therefore, leaves untouched the sea-fishing boats of non-signatory Powers in the North Sea, outside the territorial waters of the signatory Powers.

British exclusive fishery limits depend on convention and on statute.

The exclusive fishery limits of the British Islands thus depends on the two existing conventions so far as the signatory Powers concerned, but on the assertion made in the statutes so far as other Powers are concerned. But the existence of the exclusive fishery rights within those limits, the nature of those rights, and the manner in which they are protected and enforced, de-

pend on Act of Parliament. Little remains of the Act of 1868 which affects sea-fishing, for it also has been subjected to a provisional repeal in consequence of the convention with France of 1867 not having come into force. The subject is now practically governed by the Act of 1883, which enabled regulations to be made by Order in Council for the maintenance of order among sea-fishing boats and the persons belonging thereto.* This Act is really what its name implies an Act regulating sea fishing; one short section alone being devoted to confirming the Hague Convention. The engagement in article 35 of the convention to introduce necessary legislation for ensuring its execution, has been fulfilled by passing an Act making a general law for the exclusive fishery limits of the British Islands, and also for British boats beyond them.

Law as to fishing boats outside the limits.

So far as fishing boats outside these limits are concerned, they fall under three categories:—

(*a*). British boats on the high seas.

General powers have been taken to bring them within the general law of the high seas by s. 18 of the Act of 1883, assimilating them to ships in the application of any Act dealing with the high seas.

46 & 47 Vict. c. 22, s. 18.

Jurisdiction of Courts. For the purpose of giving jurisdiction to Courts under this Act, a sea-fishing boat shall be deemed to be a ship within the meaning of any Act relating to offences committed on board a ship, and every Court shall have the same jurisdiction over a foreign sea-fishing boat within the exclusive fishery limits of the British Islands, and persons belonging thereto, as such Court would have if such boat were a British sea-fishing boat.

This section presumably applies to boats in the North Sea.

(*b*). British boats in foreign territorial waters, or exclusive fishery limits.

These, under the conventions so far as the signatory Powers are concerned, and so far as other Powers are concerned in virtue of the same principle as governs the assertion of our claim in our own waters, are left to be dealt with by the laws of the States to whom those waters belong.

(*c*). Foreign boats on the high seas outside the North Sea.

These, on general principles, cannot be touched by legislation; though they, or the persons on board, may fall within some

* As to the jurisdiction over persons of any nationality "belonging to" a ship *see* pp. 28 and 144.

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of the extra-territorial provisions which have been considered in the foregoing pages. These also fall within the scope of s. 18 of the Act of 1883, which provides that they are to be treated as if they were ships.

Definitions of "exclusive fishery limits."

The central point of interest is naturally the extent of "the exclusive fishery limits of the British Islands".

As they are defined by convention they are as follows:—

French Convention of 1839 arts. 2, 3.—

2. The limits within which the general right of fishery is exclusively reserved to the subjects of the two kingdoms respectively are fixed (with the exception of those in Granville Bay) at 3 miles distance from low-water mark.

With respect to bays, the mouths of which do not exceed 10 miles in width, the 3-mile distance is measured from a straight line drawn from headland to headland.

3. The miles mentioned in the present regulations are geographical miles, of which 60 make a degree of latitude.

Hague Convention of 1882, arts. 2, 3—

2. The fishermen of each country shall enjoy the exclusive right of fishery within the distance of 3 miles from low-water mark along the whole extent of the coasts of their respective countries, as well as of the dependent islands and banks.

As regards bays, the distance of 3 miles shall be measured from a straight line drawn across the bay, in the part nearest the entrance, at the first point where the width does not exceed 10 miles.

The present Article shall not in any way prejudice the freedom of navigation and anchorage in territorial waters accorded to fishing boats, provided they conform to the special police regulations enacted by the Powers to whom the shore belongs.

3. The miles mentioned in the preceding Article are geographical miles, whereof 60 make a degree of latitude.

As they are defined by statute they are as follows:—

Sea Fisheries Act, 1868—31 & 32 Vict. c. 45, s. 5.

The terms "exclusive fishery limits of the British Islands" and "exclusive fishery limits of France" mean the limits within which the exclusive right of fishing is by Article 1 of the first schedule to this Act† reserved to British subjects and French subjects respectively:

†[*i.e.* the French Convention of 1867.]

This clause has not been included in the provisional repeal of much of this Act alluded to above; but the corresponding article of the convention has been provisionally repealed.

Sea Fisheries Act, 1883 —46 & 47 Vict. c. 22, s. 28.

The expression "exclusive fishery limits of the British Islands" means that portion of the seas surrounding the British Islands within which Her Majesty's subjects have by international law, the exclusive right of fishing, and where such portion is defined by the terms of any convention, treaty, or arrangement for the time being in force between Her Majesty and any foreign State, includes, as regards the sea-fishing boats and officers and subjects of that State, the portion so defined:

It will thus be seen that the fishery limits are expressly measured in the convention, and that in the statutory definition of 1883, limits which have been expressly settled by convention are confirmed. But so far as other Powers are concerned, this definition introduces, by its reference to exclusive rights of fishing recognised by international law, a difficulty which is by no means easy of solution. Before considering it, two other statutory provisions must be set out. In the Sea Fisheries Regulation Act, 1888—51 & 52 Vict. c. 54, s. 8—there is a provision which corresponds with the statutory definition of 1883. It provides for the internal regulation of the exclusive limits by dividing them up into fishery districts.

51 & 52 Vict. c. 54, s. 1.

Sea-fishery districts.

(1) The Board of Trade may from time to time, on the application of a county council or borough council, by order,

(*a*) create a sea fisheries district comprising any part of the sea within which Her Majesty's subjects have by international law the exclusive right of fishing, either with or without any part of the adjoining coast of England and Wales;

In the North Sea Fisheries Act, 1893—56 & 57 Vict. c. 17—which confirms another North Sea Convention, for regulating the liquor traffic among the sea-fishing boats therein, there is a special reference to the territorial waters. The convention is made between the same Powers as the Hague Convention, and expressly creates jurisdiction in the same area, that is to say, in the North Sea outside territorial waters.

56 & 57 Vict. c. 17, s. 9.

The expression "North Sea limits" shall mean the limits of the North Sea as fixed by article 4 of the convention set out in the first schedule to the Sea Fisheries Act, 1883. ‡

The expression "territorial waters" shall mean the territorial waters of Her Majesty's dominions as defined by the Territorial Waters Jurisdiction Act, 1878 [41 & 42 Vict. c. 73].

‡ [*i.e.* the Hague Convention.]

We have here two distinct questions: first, the one already suggested—What exclusive rights of fishing are recognised by international law?—the second, What is the effect of the introduction in the Act of 1893 of the definition of "territorial waters"? It will be convenient to deal with the latter question first, as it takes up the thread which was dropped in a previous chapter. Although the express object of the Hague

[*see* Part I, Chapter III, at p. 40.]

Convention, as declared by the title and preamble, was to regulate the police of the North Sea outside territorial waters, there is no definition of those waters, nor is there any in the Act of 1883 ; indeed, there is no further reference to them in either document. There is, however, an obvious inference that the limits of the exclusive fisheries, within which the police regulations of the convention were not to apply, but within which the regulations of the State to which they belonged were to apply, were identical with those of the territorial waters ; and that in defining the former the latter were also defined. Further, had there been a reference to the territorial waters in the operative part of either convention or statute, it would probably have been construed according to the only statutory meaning of the term at the time : that is, the meaning given to it by the Territorial Waters Act, 1878. This is confirmed by the introduction in the Act of 1893 of a definition which contains an express reference to the Act of 1878. Unless this uniformity of construction was intended, there would be a variance between the two North Sea Acts with regard to the area within which they operate.

Variations between "territorial waters" in Acts of 1883 and 1878.

There are two variations between the definitions of the "exclusive fishery limits" in the Convention as confirmed by the Act of 1883, and of the "territorial waters" in the Act of 1878.

The convention recognises the 3-mile fishing limit as existing round the dependent islands and banks ; but the Territorial Waters Act does not recognise the 3-mile belt as continuing round the banks.

The variation is probably, however, more apparent than real ; for the Act includes the dominion waters in its definition of territorial waters, and the dependent banks form part of the dominion, and the intervening sea part of the dominion waters. This question, however, cannot be considered as concluded until Sir William Scott's *dictum* with regard to the Goodwin Sands has been reviewed by the Courts.

[*see* Part I, p. 23.]

The more important variation arises in connection with the "headland doctrine," which is not recognised by the Territorial Waters Act. We are still dealing only with the signatory Powers, but even with regard to the subjects of these Powers, the dilemma is an unfortunate one. Either the local jurisdiction is to be exercised on the water within the

headlands, in virtue of the Hague Convention as confirmed by the Sea Fisheries Act, 1883, in which case there is a conflict between this definition and that given in the North Sea Liquor Traffic Act; or the definition of the Act of 1878 is to prevail, in which case there is no statutory authority for the exercise of jurisdiction within the headlands.

[cf. p. 285.]

As to the Hague Convention, I do not think it can be open to doubt that the intention of the Powers was to create exclusive fishing rights in the territorial waters: for the two terms are used in such a manner as to make them practically interchangeable. The necessity for regulating the police of the fisheries outside territorial waters, and the consequent regulations, left the police of the fisheries in the territorial waters to the countries to which they were appurtenant: and the definition of the limits in which this right was to be exercised was given in the form of a definition of "the exclusive right of fishery" of each country.

But if the precise area of the exclusive fishery limits is difficult to determine with regard to the subjects of Powers which are parties to the Convention, it is still more difficult to determine with regard to the subjects of other Powers; for the exclusive limits in this case are rested upon rights recognised by international law. And here it may be important to note the scope of the application of the twofold definition. The convention limits obtain against Dutch fishermen in the Bristol Channel, the international law limits against Spanish fishermen in the Wash. Convenience would without doubt suggest that the limits should be the same in all cases; and, from what has been already said with regard to the Hague Convention, I think there can be little doubt, not only that this was the intention, but also that there was the further intention of making the exclusive fishery limits coincident with the territorial waters for all purposes. But there is no explicit statement to this effect, and the terms used in the second part of the definition must be carefully examined.

The exclusive limits are declared to be those waters surrounding the British Islands within which British subjects "have, by international law, the exclusive right of fishing." This raises a question of some nicety, for it is a matter

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Right of entry into exclusive limits as defined in French Convention, 1839;

The fishing boats of the one country shall not approach nearer to any part of the coasts of the other country than the limit of 3 miles, specified in article 9 of the Convention signed at Paris on 2nd August, 1839, except under the following circumstances:—

(1) When driven by stress of weather or by evident damage to seek shelter in the harbours, or within the fishery limits of the other country.

(2) When carried within the limits established for the fishery of the other country, by contrary winds, by strong tides, or by any other cause independent of the will of the master and crew.

(3) When obliged by contrary winds or tide to beat up in order to reach their fishing ground; and when, from the same cause of contrary wind or tide, they could not, if they remained outside, be able to hold on their course to their fishing ground.

(4) When, during the herring fishing season, the herring fishing boats of the one country shall find it expedient to anchor under shelter of the coasts of the other country, in order to await a favourable opportunity for proceeding to their lawful fishery outside of the limits defined by article 9 of the Convention of 2nd August, 1839.

as now defined by the Act of 1883.

This article is, however, repealed by the Act of 1883, "in so far as it prohibits any French fishing boat from approaching nearer to any part of the coast of the United Kingdom than the limit of 3 miles." The result of this repeal apparently is, that French boats entering the English limits are now governed by s. 7 of the Act of 1883, the article of the convention still being applicable to English boats entering the French limits, in so far as the French Government may choose to enforce it.

The repeal of an article of a convention by a statute is unusual, in the absence of any agreement with the other State. Presumably no diminution of the rights under the convention was intended, but the reverse: from which it would follow, that in this article we have a statement of the ordinary cases of innocent entry into the exclusive fishery limits of another country, as recognised by international law.

The main difficulty which is likely to arise in this connection is with regard to ordinary navigation; for the limitations which are imposed on sea-fishing boats in respect of their industry in these waters, when they are treated as exclusive fishery limits, might clash with the rights of navigation apart from their industry, in the same waters when they are treated as territorial waters. The claim of exclusive fishery rights is sanctioned by international law; and international law, in recognising the claim to territorial waters as legitimate, preserves the right of free na-

vigation and probably also of free anchorage, for all nations in time of peace. The rights of navigation and anchorage for fishing boats are expressly saved by the Hague Convention; they are purposes recognised by international law, and it seems to have been the obvious intention of s. 7 of the Act of 1883, to recognise the rights as existing for all nations.

Jurisdiction outside exclusive fishery limits.

But the creation of the exclusive fishery limits for the contracting States was only incidental to the main object of the Hague Convention: that object was to regulate the police of the North Sea fisheries outside these exclusive limits, and, in order to carry this out effectually, the convention lays down certain rules which are to be observed by the fishermen, leaving it [art. 35] to the respective Legislatures of the Powers to pass the necessary legislation for enforcing these rules as against their own subjects. The rules are contained in articles 13 to 22 and 23, and regulate the conduct of fishermen in pursuing their industry.

The penal clauses of the Act of 1883, are sections 4 and 5; but they go very much further than merely enforcing the rules of the convention. In the first place, they apply the rules outside the exclusive limits to "any person belonging to a British sea-fishing boat": secondly, the rules are adopted for persons of all nationalities within the exclusive British limits: thirdly, they deal specially with certain offences, such as assault and causing damage to other fishermen and fishing boats, by all persons within the limits, and by persons belonging to British boats beyond the limits: fourthly, they apparently extend the jurisdiction over these persons with regard to both classes of offences committed within the exclusive fishery limits of the contracting States, and, it would seem also, of any other States: and lastly, by s. 18 of the Act, set out above, the high sea law and jurisdiction over ships at sea is extended to sea-fishing boats.

46 & 47 Vict. c. 22, ss. 4, 5 :—

Penal clauses of Act of 1883.

Punishment for violation of articles 13 to 22 of Convention, and for other offences.

4.—If within the exclusive fishery limits of the British Islands any person, or if outside those limits any person belonging to a British sea-fishing boat,

(*a*) acts in contravention of articles 13 to 22 (both inclusive) of the first schedule to this Act, or any of them; or,

(*b*) causes injury to any person in any one or more of the following ways, namely, by assaulting any one belonging to another sea-fishing boat, or by causing damage to another sea-fishing boat, or to any property on board thereof, or belonging thereto; or

(*c*) fishes for oysters or has on board his boat any oyster dredge within any seas and during any time within and during which oyster fishing is prohibited by law, or by any convention, treaty, or arrangement to which this Act may be hereafter applied ;

such person shall be liable, on summary conviction, to a fine not exceeding £50 or, in the discretion of the Court, to imprisonment for a term not exceeding 3 months, with or without hard labour.

Punishment for violation of article 23 of Convention.

5.—If within the exclusive fishery limits of the British Islands, any person, or if outside those limits any person belonging to British sea-fishing boat,

(*a*) uses any instrument for the purpose of damaging or destroying, by cutting or otherwise, any fishing implement belonging to another sea-fishing boat, except in the cases provided for by articles 20 and 21 of the first schedule to this Act ; or,

(*b*) takes on board or has on board such boat any instrument serving only or intended to damage or destroy fishing implements, by cutting or otherwise ;

such person shall be liable on summary conviction to a fine not exceeding 3 months, with or without hard labour, and the instrument shall be liable to be forfeited.

Sea-fishery officers.

The enforcement of the Act is entrusted to British and foreign sea-fishery officers, generically referred to in the convention as "Commanders of cruizers." The British officers [s. 11] are officers belonging to the navy, the consular service, the Customs and the coastguard, together with those nominated by the Board of Trade, the Admiralty and the Commissioners of Customs. The powers of the British officers are defined by s. 12, and include general rights of visit, search and enquiry, and seizure of prohibited implements. They are exercisable with respect to any sea-fishing boat within British limits. The powers of British and foreign officers are also defined by s. 13 as follows :—

46 & 47 Vict. c. 22, s. 13.

Powers of British and foreign sea-fishery officers.

For the purpose of carrying into effect the convention and of exercising and performing the powers and duties thereby vested in and imposed on cruizers and commanders of cruizers, a foreign sea-fishery officer may, with respect to any British sea-fishing boat, and any sea-fishery officer, whether British or foreign, may, with respect to any foreign sea-fishing boat to which this Act for the time being applies, exercise any of the powers conferred by this Act on British sea-fishery officers.

Provided that—

(*a*) Nothing in this section shall authorise a sea-fishery officer to do anything not authorised by the convention ; and.

(*b*) The port to which any sea-fishing boat or any person belonging thereto is taken shall, except where the nationality of such boat is not evidenced by official papers, be a port of the State to which such boat belongs.

The protection of sea-fishery officers, and punishment for

obstructing them in the performance of their duties, are dealt with by s. 14. Chapter IX

From the analysis of existing legislation given at the commencement of this chapter it appears that s. 13 of the Act of 1843 is still in force with regard to offences by French subjects against the convention of 1839, committed beyond the British limits.

6 & 7 Vict. c. 79, s. 13.

Proceedings in case of offences by French subjects beyond the British fishery limits.

Whenever any subject of the King of the French, or any person serving on board any French fishing boat or vessel, charged with any trangression against the said convention and articles, shall be brought into any British port, pursuant to the 65th article, in order that the offence may be duly established, it shall be lawful for the person by whom such supposed offender shall be so brought, or for any person acting under his authority, to take such supposed offender forthwith before a Magistrate or Justice of the Peace, and all constables and peace officers and others shall be required, if necessary, to give their assistance for that purpose; and it shall be lawful for the Magistrate or Justice of the Peace before whom any such supposed offender shall be brought, to enquire by all lawful ways and means into the case; and a copy of the depositions, minutes of proceedings, and all other documents concerning the transgression shall be authenticated under the hand of the Collector of Customs, and shall be sent by him to the British Consular Agent residing in the port to which the offender's boat or vessel belongs.

The mutual jurisdiction which is thus conferred on the officers of the contracting States, resembles that which is given to commanders of cruizers and other officers under the slave trade conventions, and which is recognised by s. 3 of the Slave Trade Act 1873. There is however one point of constitutional law which is not treated in the same way in the two Acts. In the Slave Trade Act, s. 3 (*b*) sanctions the seizure of foreign vessels by British officers "when duly authorised in that behalf, in pursuance of any treaty". This apparently includes the seizure of a foreign vessel in accordance with the law of the State to which she belongs. The omission of a similar provision in the Sea-Fisheries Act shows that the powers of the officers as against foreign boats, are to be exercised solely in accordance with English law.

cf. p. 108.

NORTH SEA ACTS.

Two other statutes deal specially with jurisdiction over the fishermen in the North Sea.

The Fisheries Act, 1891—54 & 55 Vict. c. 37—was passed to carry into effect a declaration between Great Britain and Belgium

Chapter IX respecting the North Sea Fisheries. The two countries being desirous of simplifying the procedure for the settlement of differences between British and Belgian fishermen in the North Sea outside territorial waters, and reducing as much as possible the injuries they may sustain from the fouling of their fishing gear, have created special tribunals for dealing with complaints.

Protection to fishermen against fouling nets.

The Act is to be construed as one with the Act of 1883, so that, as in the case of the Hague Convention, the "territorial waters" of the agreement are replaced in the Act by the "exclusive fishery limits".

The offence specially contemplated is fouling or otherwise interfering with the fishing gear of another fisherman : provision being made for awarding damages for injury to person or property. It falls within the scope of s. 4 of the Act of 1883, when committed within or without the British limits by any person belonging to a sea-fishing boat.

This Act also introduced a further provision into s. 7 of the Act of 1883, which has already been set out.

cf. p. 287.

The North Sea Fisheries Act 1893—56 & 57 Vict. c. 17—to carry into effect the convention for regulating the liquor traffic of the North Sea, has already been noticed. The offences in connection with the sale of liquor are dealt with by ss. 2 to 4 ; they apply to persons on board or belonging to British boats within the North Sea, but outside territorial waters.

cf. p. 285.

56 & 57 Vict. c. 17, ss. 2—4.

Liquor traffic offences in North Sea.

Penalty for supplying exchanging, or sealing spiritts.

2.—If within the North Sea limits but outside territorial waters any person on board or belonging to a British vessel supplies spirituous liquors to any person on board or belonging to a sea-fishing boat he shall be liable

(a) if the liquors are supplied in exchange for any article not belonging to the person supplied, to a fine not exceeding £ 50, or, in the discretion of the Court, to imprisonment for a term not exceeding 3 months, with or without hard labour ; and

(b) if the liquors are sold otherwise than by way of exchange for any such article, to a fine not exceeding £ 30, or, in the discretion of the Court, to imprisonment for a term not exceeding 3 months, with or without hard labour.

Penalty for purchasing spirits by exchange or otherwise.

3.—If within the North Sea limits but out sideterritorial waters any person on board or belonging to a British sea-fishing boat purchases spirituous liquors, he shall be liable—

(a) if he gives any article not belonging to him in exchange for the liquors, to a fine not exceeding £ 50, or, in the discretion of the Court, to

imprisonment for a term not exceeding 3 months, with or without hard labour; and

(*b*) if he purchases the liquors otherwise than by way of exchange for any such article, to a fine not exceeding £10

Penalty for breach of license.

4.—If within the North Sea limits but outside territorial waters any person on board or belonging to a British vessel deals with any person on board or belonging to a sea-fishing boat in any provisions or other articles for his use, except spirituous liquors, without a license granted in pursuance of article 3 of the scheduled convention, or without carrying on his vessel the mark agreed upon in pursuance of that article, or in contravention of any conditions of a license so granted, he shall be liable to a fine not exceeding £20, and his license may be revoked.

Some of the provisions of this Act are not very easy to follow, more especially the sections which provide for its enforcement and continuance.

56 & 57 Vict. c. 17, ss. 6, 10:—

Enforcement of Act.

6.—For the purpose of enforcing the provisions of this Act in the case of British and foreign vessels, whether within or beyond the North Sea limits, all British and foreign sea-fishery officers respectively within the meaning of the Sea Fisheries Act, 1883, shall have the same powers, and be entitled to the same protection, as they have and are entitled to for the purpose of enforcing the provisions of that Act in the case of British and foreign seafishing boats respectively.

Provided that in the case of a vessel not being either a sea-fishing boat or a vessel habitually employed in dealing with fishermen the power of a sea-fishery officer to take the vessel to any port shall not be exercised, unless the sea-fishery officer is satisfied that its exercise is necessary for the suppression of grave disorder.

Commencement and continuance of Act.

10.—

... ...

(2) The provisions of this Act relating to the sea-fishery officers of any foreign State bound by the convention set out in the first schedule to the Sea Fisheries Act, 1883, shall continue in operation notwithstanding the termination of the operation of that convention as respects that foreign State.

(3) So much of this Act as has effect outside territorial waters shall, if the scheduled convention ceases to be binding on Her Majesty, cease to apply to the vessels and officers of any foreign State bound by the scheduled convention, but subject as aforesaid, this Act shall continue in force notwithstanding the determination of the scheduled convention.

... ...

The reference in s. 10 to the effect of the Act "outside territorial waters", would seem to imply that either the whole or some part of it applied to the territorial waters. But the penal clauses expressly refer to the North Sea limits outside territorial waters, and there is no section extending the Act to these waters unless it can be inferred from s. 6. But that section goes further still, and contemplates the enforcement of the Act in the case of British and foreign vessels by British and foreign officers, whether

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within or beyond the North Sea limits. The powers given to the officers are those contained in ss. 12, 13 and 14 of the Act of 1883; but the effect of this would appear to be only to give the right of visit and search, for the power to seize any liquor is not granted. This Act is not limited to sea-fishing boats; hence the second paragraph of s. 6. The machinery of the Act of 1883 is extended to this Act, and also the special jurisdiction clause, s. 18, which is set out above.

cf. p. 283.

OYSTER FISHERIES.

By article 11 of the convention with France of 1867, a close time for oysters was provided for the whole of the Channel, fishing from 16th. June to 31st. August being prohibited "between a line drawn from the North Foreland Light to Dunkirk, and a line drawn from the Land's End to Ushant".

But this not being in force, the provisions of the convention of 1839 apply generally in the seas between England and France. The close time is from 1st. May to 31st. August, and dredging is forbidden between sunset and sunrise.

The subject is not touched by the Hague Convention.

The Act of 1868 provides generally for the protection of oyster fisheries, but does not apply to Ireland, the Isle of Man, or the Channel Islands.

Board of Trade orders establishing oyster fisheries.

By s. 29 the Board of Trade is empowered to make orders for the establishment, improvement, maintenance or regulation of oyster and mussel fisheries "on the shore and bed of the sea, or of an estuary or tidal river above or below, or partly above and partly below, low-water mark", in the Act referred to as the "sea-shore": and by s. 43, the portion of the sea-shore to which the order relates, is for all purposes of jurisdiction, to be deemed to be within the body of the adjoining county. The orders may not be made outside the exclusive fishery limits.

Oyster fisheries were again dealt with by 40 & 41 Vict. c. 42; and s. 4 of the Act of 1883, set out above, deals with offences against the laws protecting the oyster fisheries, or in violation of any convention withregard to them.

cf. p. 289.

ENGLAND AND WALES.

The sea-fisheries of England and Wales are governed by the Sea Fishery Regulation Act, 1888—51 & 53 Vict c. 54.

The power given by this Act to the Board of Trade to "create sea-fishery districts has already been referred to.

cf. p. 285.

For the purposes of this Act "the sea" is defined inversely to the usual definition of "county": it is declared to include the coast up to high-water mark.

Power to make bye-laws is given to a local fisheries committee, dealing with fishing generally, such as the method of fishing with nets, and the size of the meshes.

As the sea-fisheries extend below low-water mark a jurisdiction clause was essential, and this was added by the Fisheries Act, 1891,—54 & 55 Vict. c. 37, s 8; which provides that where any offence under the Act—

is committed on the sea-coast or at sea beyond the ordinary jurisdiction of a Court of summary jurisdiction and not on or from a ship or boat, it shall be deemed to have been committed within the body of any county abutting on that sea-coast or adjoining that sea, and may be tried and punished accordingly.

Seine-fishing on the coast of Cornwall, except so much of the north coast as lies to the east of Trevose Head, is regulated under the provisions of s. 68 of the Act of 1868. The fishery is protected within a distance of two miles from the coast.

IRELAND.

The fundamental law dealing with the Irish fisheries is 5 & 6 Vict. c. 106, amended by 7 & 8 Vict c. 108. The Act contemplates offences committed at sea, for s. 96 provides that offences committed "by any person or persons whatsoever while at sea" are to be treated as if they had been committed upon the land.

There are a few references to the sea in the body of the Act, but the distance seaward to which the sections apply is not stated. Thus, in s. 7 it is provided that no person shall set, at any time between sunrise and sunset, either in the sea or within the tideway of any estuary, any sea-net for the catching of herrings."

The territorial waters are however made the basis of legislation in respect of steam trawling, which by the Steam Trawling (Ireland) Act 1889 — 52 & 53 Vict c. 74 — is prohibited "within three miles of low-water mark of any part of the coast of Ireland".

OYSTER FISHERIES.

The Irish oyster fisheries are dealt with by s. 67 of the Sea Fisheries Act, 1868. It provides that the Irish Fishery Commis-

sioners may make regulations with regard to dredging for oysters " on any oyster beds or banks situate within the distance of 20 miles measured from a straight line drawn from the eastern point of Lambay Island to Carnsore Point on the coast of Ireland outside of the exclusive fishery limits of the British Islands ". This gives, it will be observed, a distance of 23 miles below low-water mark. The regulations which impose penalties are to " apply equally to all boats and persons on whom they may be binding " : and the Order in Council putting them in force " shall be binding on all British sea-fishing boats and on any other sea-fishing boats, in that behalf specified in the Order, and on the crews of such boats ". The intention seems to be to include foreigners.

Irish oyster fisheries claimed 23 miles to sea.

This section has replaced s. 4 of the Act of 1866 which regulated the Irish oyster fisheries—29 & 30 Vict. c. 97 which was in terms similar to s. 29 of the Act of 1868 referred to above which regulates the oyster fisheries of the rest of the United Kingdom.

The right to make such a claim unquestionable. [*cf.* Part I, Chapter II; p. 25.]

The right of a State to make a claim to fisheries on the bed of the sea, even to so large an extent seaward, has been already discussed, and it is submitted that it stands in no need of justification. The claim in this case seems specially to support the argument already advanced, that Vattel's appeal to immemorial user is, at least in our own view, unnecessary.

SCOTLAND.

The first Sea-Fishery Act dealing with the Scotch fisheries is 48 & 49 Vict c. 70 the Sea Fisheries (Scotland) Amendment Act 1885, which is linked on to the Sea Fisheries Act, 1883.

By s. 4, when the Fishery Board for Scotland are satisfied that any mode of fishing in any part of the sea adjoining Scotland within the exclusive fishery limits of the British Islands [that is, as defined by the Act of 1883] is injurious to any kind of sea-fishing within that part, they may make byelaws prohibiting or restricting it.

52 & 53 Vict. c. 23.

In 1889, the Herring Fishery (Scotland) Act was passed, which, from the point of view of jurisdiction, is one of the most interesting enactments of the fishery laws : on account of the variety of its provisions, of which the following is a brief summary.

s. 2 The Act extends only to Scotland, and to parts of the sea adjoining Scotland.

s. 5.—Herring nets are not to be shot or set between sunrise and one hour before sunset, from 1st June to 1st October, nor between sunrise on Saturday morning and one hour before sunset on Monday evening, on the west coasts of Scotland, between the Points of Ardnamurchan on the north and the Mull of Galloway on the south.

s. 6—Beam-trawling and otter-trawling is forbidden within 3 miles of low-water mark of any part of the coast of Scotland, and within the waters specified in the schedule, except where permitted by the byelaws of the Fishery Board: with the exception of Solway Firth and Pentland Firth.

The schedule deals with the waters of nearly all the bays round the much-indented coast of Scotland, by means of lines drawn between the two enclosing headlands.

s. 7.—Beam-trawling and otter-trawling may be forbidden within a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire, in any areas as defined in the byelaws.

Each of these sections contains its own penalty, but there is a further provision in s. 8, prohibiting the landing or selling in Scotland of fish illegally caught.

The fisheries were further regulated by the Sea Fisheries Regulation (Scotland) Act, 1895—58 & 59 Vict. c. 42—by which the Fishery Board for Scotland was reconstituted.

By s. 5 sea-fishery districts were to be created which were to include any part of the sea adjoining Scotland or within the jurisdiction of the Fishery Board. By s. 9, the regulation of seine trawling was added to s. 6 of the previous Act, within the waters mentioned in it.

Further extension of jurisdiction by Act of 1895.

By s. 10—beam-trawling and otter-trawling may be regulated by the Fishery Board "in any area or areas under the jurisdiction of His Majesty within 13 miles of the Scottish coast to be defined in the byelaw", except as to such areas lying opposite to any part of the coast of England, Ireland, or the Isle of Man, within 13 miles thereof:—

"Provided that no area of sea within the said limit of 13 miles shall be deemed to be under the jurisdiction of Her Majesty for the purposes of this section, unless the powers conferred thereby shall have been accepted as binding upon their own subjects with respect to such area by all the States signatories of the North Sea Convention, 1882" [58 & 59 Vict. c. 42, s. 10.]

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By s. 20, the Fishery Board may employ officers and vessels, and take such other means as shall be necessary for the efficient protection of the sea-fisheries, and for the observance of the bye-laws.

Two forms of Scotch fishery jurisdiction.

The jurisdiction claimed for the Scotch fisheries is in two distinct forms. In the Act of 1886 there is an apparent extension of the dominion waters, in the Act of 1873 a similar extension of the territorial waters in the open sea. Attention has already been drawn to the distances between the headlands in which the herring fishery has been protected. The line drawn from the Mull of Cantyre to Corsewall Point, which is the broadest expanse included in the schedule to the Act of 1889, measures about 35 miles : whilst the line from Duncansby Head to Rattray Point is about 85 miles. The question here is, therefore, whether the *intra fauces* doctrine covers these wide expanses of water, or whether the legislation has to be justified on other principles.

The proviso to s. 10 of the Act of 1895 rests the 13-mile limit of jurisdiction entirely on its acceptance by the signatory Powers to the Hague Convention. This, at first sight, would appear to exclude the subjects of non-signatory Powers from the operation of that section. It seems, however, not impossible to contend that when the jurisdiction has been accepted by the signatory Powers it would be treated as if it were incorporated in the Convention, and would thereupon, like the exclusive fishery limits, be claimed as against the world. Unless this is so, the subjects of non-signatory Powers could do with impunity what British subjects and those of the signatory Powers could not do. The object of the protective enactment would not be attained, and there would be no inducement to the North Sea Powers to accept the jurisdiction.

But, puting questions of special construction on one side, the important question is whether any or all of such legislation can be justified in its application to foreigners.

That such legislation may be made for British subjects, even to the extremest limits of the sea, is admitted : but its application to foreigners depends on other considerations which may be stated concisely thus :—

Questions involved in application of the Acts to foreigners.

(*a*)—if any of these waters are in fact within the *intra fauces* doctrine, foreigners are within the application of the law ;

(*b*)—if this legislation amounts to an uncontroverted asser-

tion to dominion over these waters, then again foreigners are bound by it ;

(*c*)—part of these waters, in so far as they are not dominion waters, must fall within the belt of territorial waters, as defined by statute. To this extent the Act becomes express legislation for territorial waters, and within this extent they are binding on foreigners ;

(*d*)—can the legislation be regarded as a legislative extension of the territorial waters ?

(*e*)—so much of the waters as are neither dominion nor territorial waters must be high sea : the question then is whether the language used in the jurisdiction clauses clearly indicates the intention of Parliament to make them applicable to foreigners ;

(*f*)—if foreigners are excluded by reason of any of these considerations, the last question is whether, apart from any words used in the jurisdiction clauses, the intention of Parliament is to protect the home fisheries in these waters, and if so, whether the legislation does not fall within the self-defensive principle, and so become applicable to foreigners.

From the analysis of the bays contained in the schedule of the Act of 1889, it results that some of the waters, or some part of the large bays, are clearly dominion waters, whether we take the 10-mile headland doctrine or the wider *intra fauces* principle : and that some of the waters are practically coincident with (some indeed being less than) the territorial waters, and some with the territorial belt when drawn outside the dominion waters.

But there remains a large area of sea which falls outside recognised principles, and the preliminary question to be decided with regard to this area is whether this legislation contains within itself any such assertion of dominion as to warrant the contention that it had been brought deliberately within the realm. To this the answer must be in the negative; legislation passed merely for regulating fisheries, of itself never carries with it a claim to territory. We must therefore fall back on interpretation.

No assertion of dominion in fishery legislation.

It may, I think, be taken for granted that legislation of this nature falls well within the principle of self-defensive legislation. But then we stumble against that rigid rule of construction, that in the absence of express indication in the words used of a larger intention, " any person " in extra-territorial legislation does not include foreigners. There can be little doubt that the rule laid

The legislation is self-defensive.

down by the Courts has always referred to an intention derivable from the literal meaning of the words used in what I have termed the jurisdiction formula. Undoubtedly there is much warrant in Sir Alexander Cockburn's judgment in *the "Franconia" case*, for a larger measure of interpretation in self-defensive legislation ; but I do not think that the Courts have at any time, save in *the Jameson case*, hinted at what this rule of interpretation should be. Lord Russell of Killowen, C.J., in construing these technical words according to "the mischief of the Act", introduced a new principle, and has advanced the subject a great stride forward. Indeed, it is not possible that so large a question should be determined by so narrow an issue as is involved in any rule of religious construction.

The rule of interpretation in self-defensive legislation.

And after all, what does the question amount to ? It may be granted that it would be much simpler for an Act to refer directly to foreigners if it is extra-territorial, and is intended to apply to them. It may be granted too, that Parliament is sometimes not too careful of the words it uses, so that its intentions are not always too clearly expressed. It may be, after all, that the rule of Parliamentary construction, is not the same as that which the Courts have laid down : that the Parliamentary idea may be that if the mischief aimed at is clearly indicated, whether it be territorial or extra-territorial, "any person" must naturally mean any person within the mischief—any person who does that which the Act was designed to prevent. Lord Russell's judgment has opened up the possibility of such a construction being ultimately adopted. Then that doctrine, admittedly not much more than a skeleton doctrine now, of self-defensive legislation, may take more definite form, and fall within a time-honoured principle. The one term includes the other : for if the object of a statute is self-defence, those are within the mischief who commit acts which make self-defence necessary. Admit that courtesy between nations has anything to say in the matter, it is admitted too that this legislation is necessary within due limits of reason.

The principle of self-defensive legislation is shadowy, because instances in which it can be applied are of so rare occurrence. The Hovering Acts and the Quarantine law undoubtedly depend on the principle : but the discussion upon them can hardly be other than theoretical. In the sea-fishery laws it becomes eminently practical, and brings the question home. Take the herring

fishery in the north East of Scotland : it is not possible that Parliament intended to forbid British subjects from using "the methods of fishing known as beam-trawling and otter-trawling" in that broad expanse of water, and did not intend to forbid their use by foreigners. No intention could be more manifest. And yet, as the jurisprudence stands at present, a narrow and religious construction of the words "any person" might utterly defeat that intention, and enable the foreigner to fish where the British subject is forbidden. The recognition of the principle which Lord Russell acted on is essential to the existence the fishing interest of the country.

The duty of the Courts, and of Parliament.

The duty of the Courts is limited to interpretation. It may be that there is a law governing even Parliament, and that the Courts might be compelled to enforce it to the extent of refusing to interpret the intention of Parliament, though made clearly manifest. Some judgments seem almost suggest that such a course would be warranted. I believe the sounder rule to be, in spite of many eminent adverse authorities, that it is for the Courts to frame rules of construction which shall carry out, and not frustrate, the intention of Parliament. On its side, in framing laws, in deciding what course it will adopt if in its opinion extra-territorial legislation applicable to foreigners is essential, Parliament will not lose sight of the principle on which such legislation is tolerated by other nations. In determining in what areas of the high sea it will protect its fishing industries, its revenue, the public health, and other matters of similar import, it will not do more than reason may justify : in sanctioning punishment in England for offences committed in foreign countries, it will be guided by the same principle : and in authorising executive action by its officers beyond the limits of the realm, it will be mindful of the principle to which all nations have adhered, that such action is tolerated only by necessity, and that the necessity of the occasion must be found to justify its exercise.

THE COLONIES.

The conventions and legislation affecting the sea-fisheries of the Colonies concern the east and west coasts of North America : briefly, the Newfoundland and the Behring Sea fisheries, together with those off the coast of Greenland.

Chapter IX

NEWFOUNDLAND.

Rights of British and American subjects in the Newfoundland fisheries.

Differences had arisen respecting the liberty claimed by the United States for its citizens to take fish in certain coasts, bays, harbours, and creeks of the British Colonies in America. It was settled by the Treaty of London, 1818, that the citizens of the United States should have for ever, in common with British subjects, the liberty to take fish of every kind on certain specified parts of the coasts of Newfoundland: and further, that the American fishermen should have liberty to dry and cure fish in any of the unsettled bays of the southern coast of Newfoundland and of the coast of Labrador; but that so soon as they became settled the right should be subject to agreement.

The convention was confirmed by 59 George III, c. 38: and by s. 2, the following further provision was made.

59 Geo. III, c. 38, s. 2.

It shall not be lawful for any person, not being a natural-born subject, in any foreign ship, nor for any person in any ship, other than one navigated according to the laws of Great Britain, to fish or to cure fish of any kind, within 3 marine miles of any coasts, bays, creeks, and harbours in any part of the American Colonies, not included within the above limits.

American fishermen were, by s. 3, allowed to enter the prohibited bays for the purpose of shelter or obtaining provisions.*

A further treaty was entered into with the United States known as the Treaty of Washington, 1871, the articles of which were put in force by 35 & 36 Vict. c. 45.

In addition to the rights obtained under the former treaty, the inhabitants of the United States were granted, in common with British subjects, the right to take fish on the sea-coasts and shores of Quebec, Nova Scotia, New Brunswick, and Prince Edward's Island, and of the several islands adjacent thereto, "without being restricted to any distance from the shore": it being explained that the liberty applied solely to the "sea-fishery".

Corresponding rights were granted to British subjects, in common with American citizens, to fish on the eastern coast and shores of the United States.

CANADA.

The fishery disputes with the United States on the west coast of the continent centred in the seal fisheries in the Behring

* This is the statute referred to in the judgment of the Privy Council in the case of Conception Bay, discussed in Chapter IV of Part I.

Sea. They were referred to arbitration, and the award was enforced by the Behring Sea Award Act, 1894—57 Vict. c. 2. The award, which is given in the schedule to the Act, contains certain concurrent regulations which it was decided were necessary for the protection and preservation of the fur-seal resorting to the Behring Sea; these were to take effect "outside of the jurisdictional limits of the respective Governments".

Rights of British and American subjects in Behring Sea fisheries.

These regulations, in so far as they concern the subject with which we are dealing, are as follow—

The two Governments shall forbid their citizens and subjects respectively, to kill, capture, or pursue the fur-seal within a zone of 60 miles around the Prybiloff Islands, inclusive of the territorial waters:

and also, from 1st May to 31st July, on the high sea in the part of the Pacific Ocean inclusive of the Behring Sea, situate to the north of the 35th degree of north latitude and eastward of the 180th degree of longitude till it strikes the water boundary between the United States and Russia, and following that line up to the Behring Sea.

Indians fishing in canoes are not interfered with, provided they are not hunting fur-seals outside the territorial waters, under contract for the delivery of skins to any person: this exemption however does not extend to the waters of the Behring Sea and of the Aleutian Passes.

The Act gave power to American fishery officers to exercise supervision over British vessels, and took power for British officers to exercise like powers over American vessels.

The Seal Fisheries (North Pacific) Act 1895—58 & 59 Vict. c. 21,—prohibited the catching of seals by British ships in the Behring Sea and in other parts of the Pacific adjacent thereto, north of the 42nd. parallel of north latitude. The Act is to be in addition to, and not in derogation of, the provisions of the former Act.

THE HIGH SEA OFF GREENLAND.

The Seal Fishery Act, 1875—38 Vict. c. 18—was passed to provide for a close time in the seal-fishery in the seas adjacent to the eastern coasts of Greenland.

No convention was entered into between the States interested in the fishery, but power was given to issue an Order in

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Council, when it appeared that the other States had made the like provisions with respect to their own ships and subjects.

General rights of fishing off Greenland.

After the issue of the Order, killing seals during the close time is prohibited by any person belonging to any British ship, or by any British subject.

For the purposes of jurisdiction, the offence is to be deemed to have been committed either in the place where it was actually committed, or in any place in which the offender may for the time being be found,

The area included in the operation of the Act is between the 67th and 75th degrees of north latitude, and the 5th and 17th degrees of west longitude.

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SUPPLEMENT

TO

NATIONALITY

PART II

ON THE

EXTRA-TERRITORIAL APPLICATION

OF

LORD CAMPBELL'S ACT.

In the 1st chapter of Part II of my work on Nationality, the application of the principles of extra-territorial legislation to actions brought under Lord Campbell's Act, is left without discussion. I avail myself of the publication of this last volume of the series to print as a Supplement to Nationality, Part II, the following remarks on this very important subject. at p. 67.

The principles of extra-territorial law as applied to Lord Campbell's Act.

The Fatal Accidents Act, 1846, popularly known as "Lord Campbell's Act," was passed "for compensating the families of persons killed by accidents." It provides that—

> Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under circumstances as amount in law to felony. *9 & 10 Vict. c. 93, s. 1.*

Collision between foreign ships on high seas, both ships to blame, causing death of person on board one.

I take the following facts. A collision has occurred on the high seas between, say, a Japanese and a Norwegian ship, and in proceedings in Admiralty both ships are found to blame. A Japanese stoker on board the former is killed as the direct consequence of the collision; his father, neither resident nor temporarily in the country, brings an action in the English Courts under the Act of 1846, against the owners of the Norwegian ship. The question to be considered is whether the action will lie, if it is brought within one year.

The two questions apparently involved are these:—

First, does the Act apply to foreign plaintiffs out of the jurisdiction, entitling them to sue and so obtain its benefits within the jurisdiction? The plaintiff has, it is assumed, given security for costs.

Secondly, assuming this question to be answered in the affirmative, does the Act apply to defendants who are foreigners out of the jurisdiction, in respect of negligence on board a foreign ship on the high seas? It is assumed that no technical question of service out of the jurisdiction arises, but the defendant to have been regularly served.

Now, on the bare construction of the Act, this result seems to be possible—If the act or neglect is one which would give rise to a cause of action in the English Courts by the person injured, if death had not ensued, and if the person, whose act or neglect it is, is a person who could otherwise be sued in the English Courts, then the action under the Act by or on behalf of the relatives of the deceased, should lie against him.

Action would lie by party injured, if death had not ensued.

The first enquiry, therefore, is—Would the action lie at the suit of the person injured in the above circumstances, if death had not ensued? By the well-known general principle, the act or neglect must be wrongful by the law of the place where it occurred, and also by English law. I have assumed both ships to blame, that is, the masters of both ships to have been guilty of negligence; it is, therefore, unnecessary to consider the difficult question which would arise supposing the negligence to have occurred on one ship and the consequences on the other. The only assumption we have to make in these circumstances is not very difficult: that the negligent navigation on either ship is tortious by the law of its flag; it is also tortious by English law. Therefore the first condition of the Act is satisfied; and it would seem to follow, on bare construction, that the action under the Act by the family would also lie.

cf. Foreign Judgments, Pt. I, pp. 167, *et seq.*

Before going into the questions raised by the Act, it is necessary to consider one further point. Supposing that by the law of the plaintiff's country an action by the relatives of a person killed by the negligence of another to be maintainable, why is it necessary to have recourse to the Act to ground the action in England? Stated more fully the point is this. If the English Courts are open to foreigners to bring actions in respect of causes of action committed abroad, why cannot this plaintiff bring an action in respect of the damage he alleges he has suffered by the death of the person injured, if it is a good cause of action in his own country? The action is by the family; and as it is in respect of an act or neglect which occurred abroad, the rule of double wrongfulness must be applied to this action also. Now it is not difficult to imagine that an action analogous to our old *per quod* actions would, in the circumstances, lie in the foreign country; for example, that a master might bring an action for the death of his servant *per quod servitium amisit*, as he might for the seduction of his servant. But, by the common law, it is not actionable in England; for in *Osborn* v. *Gillett*, on the strength of the old authorities, the Court approved the principle that "in a civil Court death cannot be complained of as an injury." Therefore, without the Act the double test is not satisfied; and therefore, apart from the Act, the action by the family would not lie in England. Therefore the action in England by the family for this act or neglect committed abroad depending entirely on the Act, the question resolves itself into this—does the Act make the act or neglect tortious, and so actionable, towards this plaintiff? If it does the rule of double wrongfulness is satisfied; if it does not, it is not.

Action by the family would not lie at common law.

Osborn v. *Gillett*, L.R. 8 Ex. 88.

Now the puzzle of Lord Campbell's Act is that it has never been definitely decided whether the basis of the action under it is identical with, or in substitution for, the non-existent *per quod* action where the cause is death, or whether it merely removes the effect of the maxim *actio personalis moritur cum persona*. Lord Blackburn's *dictum* in *Seward* v. *the Vera Cruz*, that it is "a totally new action given against the person who would have been responsible to the deceased, if the deceased had lived; an action which. . . is new in its species, new in its quality, new in its principle, in every way new," shews that the action is *sui generis*, is purely remedial, and is given because of the absence of a right to a *per quod* action in the relatives of the deceased, or because the dead man's own right of action does not survive

Act probably creates new cause of action.

Seward v. *Vera Cruz*, 10 A.C. at p. 70.

Action not maintainable even with the Act, unless the remedy it gives is for a

wrongful act towards the family.

to his representatives; but which of these two possible explanations is the true one remains in doubt. If we were to adopt this view, the condition that the act must be tortious by English law is not satisfied, and the action by the family, though maintainable in the foreign country, would not be maintainable here.

But let us assume that the principle of the Act is to make the act or neglect tortious as against the family in respect of the loss which they have suffered. We now get to the real question in issue: does the Act make *this act* or *this neglect* tortious? does the Act apply at all to *this act*, which was committed on board a foreign ship on the high seas? Does not the general principle that all legislation is territorial, unless otherwise expressed, govern the case and remove it from the operation of the Act?

Act creates a new liability,

In order to answer these questions, the nature of the Act must be carefully examined; does it create a new liability? or does it merely give a new remedy? The importance of this enquiry and the consequences which depend on the answer have not, I think, been sufficiently recognised. There can be no doubt that the Act creates a new liability, for it refers in express terms to the liability of the person whose act or neglect is in question.

which arises when and where act or neglect occurs.

But if this is so, then the liability so created arises at the time when, and at the place where, the wrongful act is committed or the neglect occurs out of which the liability arises. The principal idea of the Act being to attach a new liability to an act or neglect which did not exist before, whence the remedy by or on behalf of the relatives flows, we must, in order to decide the question, put ourselves in the place where the act or neglect occurred; for there the liability arose; thence the rights accruing from the liability come into the Courts for adjudication. Then the question in issue comes out clearly—Is *this act* one to which Lord Campbell's Act attaches its new liability? The answer must be, No. For the doctrine of territoriality of

Act applies only to acts or neglects within the jurisdiction.

legislation usually stated as a personal doctrine, in reality applies to the acts of the persons legislated for; the law is territorial both as regards the person and the act, and therefore, this Act can only apply to acts or neglects occurring within the area for which Parliament legislates; that is, the United Kingdom, and, it may be conceded for the purposes of this argument, British ships on the high seas. Certainly no further.

In order to explain this view of the law more completely, it is necessary to point out, that statutes do not apply to British

subjects abroad, unless it is expressly or by necessary implication so provided. Therefore it seems beyond doubt that Lord Campbell's Act does not apply to acts or neglects of British subjects abroad or on foreign ships. And the result of the argument is that it does not apply to such a case as I have assumed, where there has been an act or neglect on board a foreign ship on the high seas. Therefore, all other questions apart, this action does not lie under the Act.

The doctrine of territoriality of laws prevents the action being brought.

Further, if we look at the question from the point of view of *this plaintiff*, we get to the same result, by another chain of reasoning. The question may be stated in this way—Here is a statute which deals with actions brought in the English Courts; and here is a plaintiff, who though a foreigner, is entitled, having given security for costs, to sue in the English Courts. Why then may he not have the benefit of the Act?

Does the Act apply to this plaintiff?

In the first place, the fact that a foreigner is suing in the English Courts does not so bring him within the jurisdiction as to make him subject to its laws, or so entitle him to the benefit of its laws, as a resident foreigner is. He is only so far within the jurisdiction as to be subject, for good or evil, to the laws specially applicable to other persons in the same position as himself, that is to say, to the laws of procedure as they may affect his proceedings in the Court. Lord Campbell's Act is not a law of procedure. He is, therefore, so far this Act is concerned a non-resident foreigner: and the question is, whether a non-resident foreigner is entitled to the territorial benefits which this Act confers. There is no question here whether the Act applies extra-territorially; but merely whether an absent foreigner may avail himself of a territorial statute. It is undoubted that there are some statutes, purely territorial in their application, the benefits of which may be enjoyed by non-resident foreigners, even though the statutes are not expressly (as in the case of the Patent Acts) extended to them. Where the rights created by a statute depend for their enjoyment merely on the fulfilment of a condition, undoubtedly non-resident foreigners may acquire the rights if they perform the condition. So, where the rights granted by a statute are attached to persons in a certain position, for example, owners of land, undoubtedly non-resident foreigners, if they are in the position to which the statute relates, acquire the rights. Therefore, as a proposition of law, it is inaccurate, because it is incomplete, to say that territorial statutes do not confer rights on non-resident foreigners: as inaccurate as it is

Foreigner suing in England becomes subject only to laws of procedure.

cf. Nationality, Pt. II, Chap. VII.

Enjoyment of territorial rights by non-resident foreigners.

to say that they confer rights, without more, on non-resident subjects.†

Extension of these principles to Lord Campbell's Act.

Now, if we apply these principles to Lord Campbell's Act, we arrive at the following result. Assuming that the act or neglect occurred within the area of its application, on the hypothesis, the person injured by it was also within that area at the time of its occurrence. Then supposing some special remedy given to him, say, treble damages, he could recover them in the English Courts although a non-resident foreigner, for the Act applied to all parties and to the act or neglect itself, at the time of its occurrence.

If then the Act applies to the act or neglect so that the person injured could have brought an action if death had not ensued, then the only question which arises in regard to the relative's obtaining the benefit of the Act is that he should fulfil the conditions of the Act, or be in the position of persons to whom the Act applies. He is in that position, and his non-residence in this respect makes no difference; and the Act imposes no condition to be fulfilled, only the law comes in and imposes the condition of security for costs in respect of the fact that he is a non-resident plaintiff. But if the act or neglect occurred on a foreign ship on the high seas, then the Act does not apply to it, and the question falls to the ground.

The Act gives remedies to non-resident foreigners for acts or neglects committed within the jurisdiction.

The conclusion therefore seems to be, that Lord Campbell's Act is a purely territorial statute, attaching a liability on all persons who commit acts or neglects within the area to which the statute is applicable, which cause the death of a person, both persons being either subjects or foreigners, in favour of the persons specified in the Act, even though those persons are non-resident foreigners.

Adam v. *British SS. Co.* 1898, 2 Q.B. 430. *Davidsson* v. *Hill*, 1901, 2 K.B. 606.

The question here discussed has been the subject of two decisions in England, *Adam* v. *British and Foreign Steamship Co.*, and *Davidsson* v. *Hill*; but the argument proceeds on different lines to those of the judgments.

† The decisions in *Jeffreys* v. *Boosey* and *Routledge* v. *Low*e, are fully discussed in Nationality, Part II, pp. 248, *et seq.*

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